

# Article III as a Fundamental Value—The Demise of *Northern Pipeline* and Its Implications for Congressional Power

GEORGE D. BROWN\*

The Supreme Court's 1982 decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*<sup>1</sup> appeared to be one of those landmark cases that move the law in significant new directions. *Northern Pipeline* struck down an attempt by Congress to transfer responsibility for a broad range of bankruptcy adjudication to federal officials who were not article III judges. Justice Brennan's plurality opinion is a ringing affirmation of the central role of article III courts, and judges, within the national government. Relying heavily on the language of the Constitution and the apparent intent of the framers, the opinion expresses a presumption in favor of article III adjudication, subject to narrow exceptions. *Northern Pipeline* is more than a reminder of the judiciary's co-equal role within the national scheme of separation of powers. Read broadly, Justice Brennan's opinion casts doubt upon the validity of a wide range of non-article III adjudicative mechanisms, including decision making by administrative agencies and the current use of magistrates in federal courts.<sup>2</sup>

The generative force of *Northern Pipeline*, was, however, uncertain from the outset. Justice Brennan's analysis did not attract a majority of the Court.<sup>3</sup> Many commentators were extremely critical of his opinion.<sup>4</sup> They found fault with his methodological approach, poked holes in his doctrinal analysis, and recoiled from the possible consequences. Thus, one could cite *Northern Pipeline* as anything from a bold first step to an aberration. Within four years a majority of the Court appears to have opted for the latter view. *Thomas v. Union Carbide Agricultural Products Co.*<sup>5</sup> and *Commodity Futures Trading Commission v. Schor*<sup>6</sup> rejected attempts to extend *Northern Pipeline* and accorded Congress considerable latitude in choosing adjudicative mechanisms, at least where administrative agencies are involved and some degree of appellate review in an article III court is provided. Inevitably, these cases raise the question of whether the *Northern Pipeline* "doctrine," assuming there ever was one, is now defunct.

This Article examines *Northern Pipeline* and its successor cases in an effort to measure how far these two swings of the pendulum actually extended and whether the

---

\* Professor of Law, Boston College Law School; A.B., 1961, Harvard College; L.L.B., 1965, Harvard Law School. An initial version of this Article was presented at a Boston College Law School Faculty colloquium.

1. 458 U.S. 50 (1982).

2. See, e.g., *Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc.*, 725 F.2d 537, 555 (9th Cir. 1984) (en banc), cert. denied, 469 U.S. 823 (1985) (dissenting opinion) (magistrates); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587-88 (1985) (administrative agencies).

3. Justice Rehnquist, for himself, and Justice O'Connor concurred, *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 89 (1982). Justice White, for himself, Chief Justice Burger and Justice Powell dissented. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.* 458 U.S. 50, 92 (1982).

4. E.g., Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197 (1983) [hereinafter Redish]; *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 257 (1982).

5. 473 U.S. 568 (1985).

6. 106 S. Ct. 3245 (1986).

principles articulated by Justice Brennan might still serve as effective constraints on Congress. Section I deals with the *Northern Pipeline* case, focusing both on Justice Brennan's vision of the federal judiciary and on the serious criticisms levelled against his opinion. Section II considers the Court's hasty retreat from *Northern Pipeline*, examining the mode of analysis in *Thomas* and *Schor* as well as the actual holdings. This consideration suggests that, from the point of view of *Northern Pipeline*'s defenders, the retreat is a rout. Section III attempts to explain this reversal. While answers may lie in the decision's internal weaknesses and its implications, two further explanations are assayed: changing approaches to questions of separation of powers, and the possibility that a majority of the current Court simply does not share Justice Brennan's view of the importance of article III tribunals. A fundamental theme of the Burger Court's jurisprudence has been the need to constrain the federal judiciary in both public and private law matters. This attitude may tell us something about the post-*Northern Pipeline* deference to Congress.

*Northern Pipeline*, however, has not been overruled. With this in mind, Section IV considers its possible continuing applicability in three areas: administrative adjudication, congressional power over federal court jurisdiction, and the use of alternative judicial mechanisms such as magistrates. In the first area constraints on Congress appear to be few. As for the second area, the *Northern Pipeline* trilogy does serve to reinforce prevalent notions of congressional power over lower federal court jurisdiction. At the same time the Court's continuing insistence that there is some irreducible "essential" role for the federal judiciary supports arguments that Congress' power over the Supreme Court's appellate jurisdiction is subject to inherent constitutional limits. As for the third area, *Northern Pipeline* may yet resurface as an important brake on efforts to alter the form of adjudication within article III courts.

## I. *NORTHERN PIPELINE* AND ITS VISION OF THE ARTICLE III JUDICIARY

### A. *The Article III Judiciary According to Justice Brennan*

At issue in *Northern Pipeline* was Congress' assignment of bankruptcy disputes to "bankruptcy courts" staffed by "bankruptcy judges" who did not enjoy the tenure and salary provisions of article III.<sup>7</sup> They were appointed by the President for terms of fourteen years, not for life; they could be removed by the judicial council of the relevant circuit on grounds seemingly broader than the "good behavior" standard of article III;<sup>8</sup> and Congress could lower their salaries. These non-article III tribunals were authorized to adjudicate a broad range of matters including claims based on state law. In *Northern Pipeline* the defendant in a state law contract action challenged on constitutional grounds the bankruptcy court's power to hear the case. The Supreme Court struck down the statute by a margin of six to three.

---

7. For a general description of the system, see *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 52-56 (1982).

8. U.S. CONST. art. III, § 1.

Writing for a plurality of four, Justice Brennan utilized the case as the vehicle for a general exposition of the role of the federal courts. His first step was to posit recourse to those courts as the norm for initial adjudication at the federal level.<sup>9</sup> He then analyzed a number of exceptions to this norm, and concluded that the bankruptcy courts did not fit within any of the exceptions.<sup>10</sup> Justice Brennan's opinion is significant in a number of aspects, not the least of which is his attempt to bring schematic clarity to a subject generally viewed as mired in chaos and confusion.<sup>11</sup>

Of particular importance is his vision of the status and role of the federal judiciary. This vision is developed in the opening portion of the opinion, where he establishes the presumption in favor of article III adjudication. This segment of the opinion is a latter day counterpart to that of Chief Justice Marshall in *Osborn v. Bank of the United States*.<sup>12</sup> Anxious to affirm the scope of the national judiciary, Marshall declared that "the legislative, executive, and judicial powers of every well constructed government are co-extensive with each other," and that the "framers kept this great political principle in view."<sup>13</sup> In a similar vein, Justice Brennan emphasizes the co-equal status of the federal judiciary. It "stands *independent*" of the other two branches "to maintain the checks and balances of the constitutional structure, and [also] to guarantee that the process of adjudication itself remain[s] impartial . . ."<sup>14</sup>

Justice Brennan finds support for this view in the specific language of article III,<sup>15</sup> the broader structural imperatives of the Constitution,<sup>16</sup> and the pre-Revolutionary experience with a subservient judiciary.<sup>17</sup> Nevertheless, there is an element of sleight of hand in all this. Justice Brennan repeatedly refers to the constitutional "command"<sup>18</sup> of an independent judiciary as if it were a command that the federal judiciary be created in the first place alongside the legislative and executive branches. There is an apparent parallel among articles I, II, and III. Each article prescribes that a particular power "shall be vested" in a particular branch.<sup>19</sup> However, article III gives Congress the choice to create or not create any federal tribunal other than the Supreme Court.<sup>20</sup> The theory has been advanced that Congress must create a federal judiciary, but this theory is not widely accepted.<sup>21</sup>

Justice Brennan appears to concede this point in a footnote.<sup>22</sup> However, he limits

9. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 57-60 (1982).

10. *Id.* at 63-87.

11. *See, e.g., id.* at 90 (Rehnquist, J., concurring) (area one of "frequently arcane distinctions and confusing precedents . . ."). *Glidden Co. v. Zdanok*, 370 U.S. 530, 534 (1962) (same).

12. 22 U.S. (9 Wheat.) 738 (1824).

13. *Id.* at 818-19. Marshall was, in part, paraphrasing an argument of counsel. He also expressed his strong agreement with it.

14. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 58 (1982) (emphasis added).

15. *Id.* (quoting U.S. CONST. art. III, § 1). "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

16. *Id.* at 57-60.

17. *Id.* at 59-60.

18. *Id.* at 58, 62-63.

19. U.S. CONST. art. I, § 1 (legislative power vested in a Congress); U.S. CONST. art. II, § 1 (executive power vested in a president); U.S. CONST. art. III, § 1 (judicial power vested in one supreme court and such inferior courts as Congress may create).

20. U.S. CONST. art. III, § 1, "such inferior courts as the Congress may, from time to time, ordain and establish."

21. *See, e.g., C. WRIGHT, LAW OF FEDERAL COURTS* 36-39 (4th ed. 1983).

22. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 64 n.15 (1982).

its thrust by countering that "the Framers did not leave it to Congress to define the character of [federal] courts—they were to be independent of the political bodies and presided over by judges with guaranteed salary and life tenure."<sup>23</sup> Thus Justice Brennan seems to have reverted to a position one step short of mandatory vesting. To the extent that Congress vests the judicial power of the United States anywhere, rather than leave federal matters to state courts, that power "must be exercised by courts having the attributes prescribed in Art. III."<sup>24</sup> This absolutist<sup>25</sup> position is entirely faithful to the language of article III and perhaps to its spirit. Nevertheless, the position is difficult to maintain in light of Congress' utilization, and the Court's acceptance, of a wide variety of non-article III adjudicative bodies.<sup>26</sup> Recognizing this, Justice Brennan takes another adroit step backwards. Article III adjudication is the norm. To be valid, non-article III adjudicative bodies must either fit within a narrow group of exceptions to this principle<sup>27</sup> or operate in such close relationship to an article III court as to become a subordinate component ("adjunct") of that court.<sup>28</sup> The bulk of Justice Brennan's opinion is an elaborate exercise in justifying and explaining these departures from the posited norm of article III adjudication as a fundamental constitutional value. In each instance he concludes that the bankruptcy courts do not fit within the exception.

He deals first with Congress' power to provide for resolution of disputes in tribunals outside of article III, either "legislative courts" or administrative agencies. Although Congress has done so many times throughout the country's history, valid use of these tribunals can be reduced to "three narrow situations . . . :"<sup>29</sup> territorial courts, including those for the District of Columbia;<sup>30</sup> courts-martial;<sup>31</sup> and tribunals adjudicating so-called "public rights."<sup>32</sup> The first and second situations are justified as flowing from Congress' exercise of an "exceptional" grant of power.<sup>33</sup> This rationale should not be extended to the creation of tribunals under the article I bankruptcy power. To accept this argument would be to ignore the special circumstances which obtain when Congress acts to govern the territories or to structure the armed forces. It would also provide no limits on the broad use of article I power to undermine the principle of article III adjudication, thus threatening the "erosion" of the judicial branch.<sup>34</sup> Justice Brennan's analysis of the first two exceptions is relatively straightforward, although it does depend on the ability to distinguish between grants of power to Congress which are extraordinary and those which are not.

---

23. *Id.*

24. *Id.* at 59.

25. For a hypothetical illustration of the absolutist position, see Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 584-85 (1985) [hereinafter Resnik].

26. See, e.g., *id.* at 586-87.

27. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 63-76 (1982).

28. *Id.* at 76-87.

29. *Id.* at 64.

30. *Id.* at 64-65.

31. *Id.* at 66.

32. *Id.* at 67-70.

33. *Id.* at 64, 70.

34. *Id.* at 74.

The third situation, the issue of public rights adjudication, is much more complex. Justice Brennan defines public rights as matters arising between the government and individuals which could, historically, have been determined outside the judicial branch.<sup>35</sup> Monetary claims against the government, for example, might run afoul of the doctrine of sovereign immunity. Since the government could prevent their being heard at all, it has a choice of means as to how public rights claims shall be heard, including their adjudication by non-article III bodies.<sup>36</sup> While the public rights-private rights line may not always be easy to draw, the contract claim at issue in *Northern Pipeline* clearly falls on the latter side. For Justice Brennan, such cases "lie at the core of the historically recognized judicial power."<sup>37</sup>

The notion of a core of article III matters has considerable appeal, and can be traced to the famous distinction in *Murray's Lessee v. Hoboken Land & Improvement Co.*<sup>38</sup> between inherently judicial matters, nonjudicial matters, and those which might or might not be heard by a court. Nevertheless, the public-private dichotomy is beset with uncertainties. One such uncertainty is distinguishing between the two kinds of rights. Justice Brennan admits that the presence of the government as a party does not by itself make a case one of public right.<sup>39</sup> Particularly puzzling is his apparent insistence that the public rights doctrine is triggered only by the exercise of one of those elusive "exceptional" grants of congressional power.<sup>40</sup> This seems inconsistent with his recognition that public rights can be created by the exercise of many of the enumerated powers.<sup>41</sup> Furthermore, the notion of a public right, assuming it is valid at all, would seem to flow more from a particular government-citizen relationship, such as a benefit, rather than from the particular congressional power which created the right. A final puzzlement, with respect to adjudication of public rights, is Justice Brennan's reintroduction of the article III courts through the suggestion that their appellate review of such disputes may be constitutionally required, suggesting that the government's choice of means is not unlimited after all.<sup>42</sup> (For matters within the article III core, even appellate review is not enough.)<sup>43</sup> In sum, Justice Brennan himself seems uneasy with the notion of public rights and anxious to confine it.

Confined or not, the doctrine of public rights cannot justify the extensive adjudicative role played by administrative agencies. Justice Brennan is able to deal with this role while considering an alternative argument in favor of the bankruptcy judges, namely, that they are set up as "adjuncts" to the various federal district courts.<sup>44</sup> He notes that the Court has, indeed, upheld the use of such adjuncts, including administrative agencies. For him the cases suggest two guidelines: first, that Congress' power to assign functions to an adjunct is greatest when it has created

---

35. *Id.* at 67-68.

36. *Id.*

37. *Id.* at 70.

38. 59 U.S. (18 How.) 272 (1855).

39. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 69 n.23 (1982).

40. *Id.* at 70.

41. *Id.* at 69 n.22.

42. *Id.* at 69-70 n.23.

43. *Id.* at 86-87 n.39.

44. *Id.* at 76-87.

the underlying right;<sup>45</sup> and second, that any such scheme must not take from the article III court "the essential attributes" of judicial power.<sup>46</sup>

The adjunct argument could be quickly disposed of in *Northern Pipeline* itself.<sup>47</sup> The contract rights in that case arose under state law rather than under a statute enacted by Congress. Moreover, the bankruptcy courts functioned as the basic adjudicators of all matters, leaving article III tribunals in an essentially appellate role. Yet the role of article III tribunals, for Justice Brennan, cannot be so limited. In the constitutional scheme, article III tribunals are to be the primary adjudicators in all cases. Their tasks include "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law."<sup>48</sup> Thus the system of bankruptcy courts runs afoul of both guidelines and represents an encroachment upon the article III judicial power. Once again, however, Justice Brennan's general analysis raises a number of questions.

As stated, his approach to the use of adjuncts appears to constitute a two-part inquiry: whether Congress created the right *and* whether it left the "essential attributes" intact. It appears that Congress can provide for the use of adjuncts in any case, but Congress' actions are subject to "stricter scrutiny" when it has not created the right.<sup>49</sup> This sliding scale results in a somewhat awkward use of the concept of essential attributes. If they really are essential, why should the source of the rights involved allow a greater or lesser diminution? As with public rights, Justice Brennan's deference to Congress when it chooses adjudicative mechanisms in exercising the range of enumerated powers is inevitably in conflict with his vision of article III adjudication as the norm. With adjuncts, the problem can be finessed to some extent by viewing them as within the article III structure. Even so, the more one accepts diminution of the essential attributes, as Justice Brennan's sliding scale does, the closer this view comes to fiction since the adjuncts become an alternative to article III tribunals. With all its flaws, however, the Brennan opinion is an ambitious attempt to synthesize the status of all federal adjudicative bodies in light of the perceived overriding imperative of fidelity to article III. One must next consider why five of his colleagues refused to join in the undertaking.

#### B. *Blurring the Vision—Concurrence and Dissent*

Justice Rehnquist, writing for himself and Justice O'Connor, concurred in the judgment but not in the Court's opinion.<sup>50</sup> The views of these two Justices take on particular significance in that both of them joined the Court's swift retreat from *Northern Pipeline* in *Thomas v. Union Carbide Agricultural Products Co.*<sup>51</sup> and *Commodity Futures Trading Commission v. Schor*.<sup>52</sup> Indeed, Justice O'Connor wrote

---

45. *Id.* at 80.

46. *Id.* at 81.

47. *Id.* at 81-87.

48. *Id.* at 86-87 n.39.

49. *Id.* at 82-83.

50. *Id.* at 89.

51. 473 U.S. 568 (1985).

52. 106 S. Ct. 3245 (1986).

the majority opinion in each case. In part, the position taken by the concurrence rests on a disagreement with the breadth of the holding in *Northern Pipeline*. Justice Rehnquist did not think that the constitutional validity of the entire range of the bankruptcy courts' authority was properly before the Court.<sup>53</sup> He was willing to strike down the statute conferring that authority because, as drafted, the statute was not severable and because the only federal body which could validly hear the matter at issue in *Northern Pipeline* would be an article III court. That matter is a state-created, common law contract claim, an example of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."<sup>54</sup> Thus he agrees with Justice Brennan that there is a core of federal judicial power which must remain in article III courts. He apparently advocates an historical test as the means of identifying that core. Justice Rehnquist also expresses agreement with Justice Brennan that appellate review by an article III court is not enough to satisfy the Constitution if a particular case is within the core.<sup>55</sup> The bankruptcy courts had too much power over cases to be characterized as adjuncts.<sup>56</sup> Therefore, in *Northern Pipeline*, the statute extended beyond constitutional limits because a non-article III body adjudicated a matter which Congress could not assign to it.

The Rehnquist concurrence, if this was all it contained, might be read as differing from the plurality only over the narrow question of the proper extent of the constitutional holding, given the facts before the Court. However, Justice Rehnquist also indicated a willingness to interpret the public rights doctrine broadly to sustain other, unspecified aspects of the bankruptcy system not before the Court.<sup>57</sup> Just how far he would go in showing deference to Congress' use of non-article III tribunals cannot be gleaned from this apparent reference to bankruptcy matters arising under federal law. Even if there is a fairly wide gap between Justices Rehnquist and Brennan over the scope of the public rights doctrine, the Rehnquist concurrence seems close to an acceptance of the plurality's general mode of analysis. Justice Rehnquist, however, asserts that the question remains open.<sup>58</sup>

Justice White's dissenting opinion<sup>59</sup> displays no such ambiguity. For him the plurality was simply wrong in attempting to erect a rigid analytical structure and testing the bankruptcy courts against it. Part of this disagreement rests on his view that the new system of bankruptcy judges was only a marginal extension of the previous system.<sup>60</sup> Bankruptcy referees—the judges' predecessors—were already handling a wide variety of state law matters: "[T]he great bulk of creditor claims . . ."<sup>61</sup> Extending this presumably valid jurisdiction to claims of the bankrupt against third parties should not trigger constitutional objections. Even if

---

53. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 89–90 (1982).

54. *Id.* at 90.

55. *Id.* at 91.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 92.

60. *Id.* at 99–100.

61. *Id.* at 96.

invalid, only the extension should be struck down, not the entire system of bankruptcy judges.<sup>62</sup> Since, however, the plurality has escalated the debate to the general level of what Congress may validly assign to non-article III courts, Justice White considers these issues as well. He recognizes the textual and historical support for the literalist position that any congressionally created entities which exercise the judicial power as described in article III must be courts as described in that article.<sup>63</sup> The problem is that the Court has sustained the validity of a wide variety of federal adjudicative entities which do not fit that description—especially administrative agencies—and it is no longer possible to “disregard 150 years of history . . . .”<sup>64</sup>

Justice White surveys the extensive body of precedent and concludes, as others have, that the cases cannot easily be reconciled, much less reduced to a black letter test.<sup>65</sup> The Court has upheld the use of non-article III courts in so many different contexts that “there is no difference in principle between the work that Congress may assign to an [a]rticle I court and that which the Constitution assigns to [a]rticle III courts.”<sup>66</sup> One cannot escape this conclusion either by recourse to the nature of the power Congress used to set up the tribunal<sup>67</sup> or to distinctions based on the nature of the business before the tribunal.<sup>68</sup>

The latter approach has been a hallmark of several attempts, unsuccessful in Justice White’s view, to fit the article III precedents into a neat pattern.<sup>69</sup> As for the former, Justice White disagrees strongly with the plurality’s view that some congressional powers are extraordinary while others are not.<sup>70</sup> This disagreement is reflected in their differing treatment of *Palmore v. United States*,<sup>71</sup> which upheld the authority of non-article III courts in the District of Columbia to try federal criminal cases. The plurality treats *Palmore* as analogous to Congress’ special power over territories.<sup>72</sup> Justice White views Congress’ power over the District of Columbia as “not different in kind from numerous other legislative responsibilities,”<sup>73</sup> although the relevant quote from *Palmore* might be read either way.<sup>74</sup>

---

62. *Id.* at 100.

63. *Id.* at 92–93.

64. *Id.* at 93.

65. *Id.* at 93.

66. *Id.* at 113.

67. *Id.* at 104.

68. *Id.* at 113.

69. *Id.* at 105–13.

70. *Id.* at 114. (Power over District of Columbia “not different in kind from numerous other legislative responsibilities.”).

71. 411 U.S. 389 (1973).

72. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 75–76 (1982).

73. *Id.* at 114.

74. The *Palmore* opinion, written by Justice White, stated that “the requirements of [a]rticle III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.” *Palmore v. United States*, 411 U.S. 389, 407–08 (1973). In *Northern Pipeline* Justice White apparently reads “areas” as referring to subject matter areas, not geographical areas, and reads it as applicable to all article I enumerated powers, despite the qualifying reference to “laws of national applicability, etc.” However, earlier in *Palmore*, White treated the District of Columbia as a “subject” Congress could deal with in ways which would otherwise exceed its powers. *Id.* at 397–98.



Justice White is also unwilling to treat the adjunct cases as creating a broad domain which is saved only by being within article III.<sup>75</sup> He views *Crowell v. Benson*<sup>76</sup> as upholding the “use of an art[icle] I adjudicative mechanism”<sup>77</sup>—an administrative agency which handled private claims—both because it dealt primarily with matters of fact and because article III appellate review was available. Moreover, his statement that the adjunct cases do not establish any “outer limits of constitutional authority”<sup>78</sup> suggests that such entities can be given more power to the point of obliterating any distinction between them and other non-article III adjudicators.

Once Justice White has demolished the plurality’s structure, the question arises of what he would put in its place. At times he appears to say that anything goes, that Congress can assign whatever it wants to non-article III courts.<sup>79</sup> However, he ultimately eschews total deference to Congress, and insists that “[a]rticle III is not to be read out of the Constitution . . . .”<sup>80</sup> The answer is a form of balancing test: the values expressed (or “furthered”) by article III “must be balanced against competing constitutional values and legislative responsibilities.”<sup>81</sup> The Court is, in reality, to measure twice. First, it must determine the extent of legislative accomodation or undermining of the article III values. Second, it must measure any burden on them “against the values Congress hopes to serve through the use of [a]rt[icle] I courts.”<sup>82</sup> The second step suggests that Congress could win every time since there is no absolute barrier if its “values” are strong enough.

The fact that Congress nearly always provides for appellate review apparently saves Justice White from contemplating any such dire consequences.<sup>83</sup> Appellate review protects what he views as the major article III value: the presence of a court to enforce constitutional limits on the political branches.<sup>84</sup> Any additional interest attached to independent adjudication may flow from the due process clause rather than directly from article III.<sup>85</sup> This interest is not threatened if the matters in question are unlikely to be of concern to the political branches. The use of bankruptcy judges threatens neither value, and reflects a compelling need for congressional action. Thus, the plurality was wrong in approach and wrong in result.

In sum, *Northern Pipeline* shows deep divisions within the Court over how to approach the question of article III limits on congressional power. In part, the differences are in the realm of doctrine and methodology. In part, they reflect differing assessments of impact—how often a given approach would strike down congressional arrangements and whether such outcomes are desirable. Beneath these

---

75. He seems to view the majority’s adjunct analysis as representing the general issue of constitutional limits on Congress’ power to go outside article III, although he does not deal with it extensively. See *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 94, 100–03 (1982).

76. 285 U.S. 22 (1932).

77. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 109 (1982).

78. *Id.* at 101.

79. *E.g.*, *id.* at 105, 113.

80. *Id.* at 113.

81. *Id.*

82. *Id.* at 115.

83. *Id.*

84. *Id.* at 115–16.

85. *Id.* at 117.

differences there may lie an even more important one: contrasting views about the role and importance of article III courts, particularly as initial adjudicators.

### C. *The Northern Pipeline Doctrine—Weaknesses and Strengths*

*Northern Pipeline* has been sharply criticized, even by those sympathetic with what Justice Brennan was trying to do.<sup>86</sup> Because of these criticisms, and because of the Court's apparent second thoughts about *Northern Pipeline*, this article will first consider the decision's weaknesses as impediments to *Northern Pipeline*'s development as a precedent of generative force.

On the doctrinal level, Justice Brennan's opinion is shaky in several respects, some of which have been noted above.<sup>87</sup> Its heavy reliance on the public-private rights distinction is an oft-cited weak spot.<sup>88</sup> The distinction made sense under the common law view of the world represented by *Murray's Lessee*. But in a world of statutorily created rights and benefits the line is less clear. Relationships between individuals and the state can represent forms of property as important as any private interest which the common law protected.<sup>89</sup> If article III adjudication is an important means of protecting vital private interests—which seems to be a major premise of Justice Brennan's opinion—then it ought to be available for many public rights, especially since the government is a party to any dispute. The salary and tenure guarantees of article III ensure that the government is not judge of its own cause.<sup>90</sup> Another doctrinal weakness is the notion that the particular power Congress has utilized can guide the Court's decision whether to accept use of a non-article III mechanism. Trying to differentiate extraordinary powers from those that are not is nearly an impossible task, as Justice Brennan's opinion demonstrates. On the one hand, he attempts to confine the cases upholding territorial courts and courts martial to the extraordinary powers category.<sup>91</sup> On the other hand, he treats the public rights doctrine as also related to "exceptional" grants of power, but lists as examples those relating to commerce, taxation, immigration, and the post office.<sup>92</sup> Obviously he does not wish to treat all article I powers alike since that would provide no limiting principle to the use of non-article III courts.<sup>93</sup> But in a sense all of Congress' powers are extraordinary in that they represent the domain of a government limited in scope but supreme within that domain. In this respect it is useful to consider the Court's approach in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>94</sup> *Garcia* involved the question of federalism-based limits on congressional authority, a

---

86. E.g., Redish, *supra* note 4; Resnik, *supra* note 25.

87. See *supra* text accompanying notes 5–11.

88. E.g., Resnik, *supra* note 25, at 600; *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 262–65 (1982).

89. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

90. Justice Brennan appears to accept this argument. See *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 68 n.20 (1982); see also Resnik, *supra* note 25, at 600.

91. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 64, 67 (1982).

92. *Id.* at 70.

93. *Id.* at 73.

94. 469 U.S. 528 (1985).

structural issue similar in many ways to that of the limits imposed by article III.<sup>95</sup> *Garcia* appears to reject any notion that federalism constraints vary in strength depending on the power used. All powers of the national government are of an apparently equal status.<sup>96</sup>

As a matter of methodology, the *Northern Pipeline* plurality opinion points toward a literal application of article III, but pulls back to the notion of a constitutionally protected "core" of judicial power. If article III limited adjudication of core matters to tribunals constituted in a certain way then a bright line test would still be possible. But because the Court has allowed such adjudications outside article III Justice Brennan is forced into his elaborate schema of exceptions and adjuncts. Of course, he is compelled to backtrack in order to save adjudication by administrative agencies. Administrative agencies, however, do considerably more than handle public rights disputes, and it is very hard to think of them as mere adjuncts of article III courts. If anything, the relationship is the other way around, given courts' deference to agency decisions in the realm of law as well as fact. For all these reasons the emergence of a *Northern Pipeline* doctrine significantly limiting congressional power to choose the means of adjudication might have seemed remote, even without the advantage of hindsight.

Such weaknesses are not surprising, however, in a decision which attempts to break new ground and break with a past of almost total deference to Congress.<sup>97</sup> Opinions which attempt to change the law may well have difficulty in altering existing precedent to fit a new mold. It is possible to view Justice Brennan as seeking a restoration of article III limits along the lines which the framers envisaged. One can even treat his opinion as analogous to that of Justice Rehnquist in *National League of Cities v. Usery*,<sup>98</sup> also an attempt to re-establish limits.<sup>99</sup> The great strength of the Brennan opinion lies in its effort to block any further erosion of the role of article III courts as the adjudicative arm of the national government. Thus, a *Northern Pipeline* doctrine would utilize the notion of core judicial matters to require that certain adjudications take place at all stages in article III courts or their adjuncts.

---

95. See, e.g., Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 513–14 (1987). [hereinafter Strauss, *Formal and Functional*].

96. Thus the *Garcia* majority stated that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1982) (emphasis added). However, the notion that some powers are more plenary than others, in terms of constitutional restraints upon them, is a recurring one. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (in exercise of fourteenth amendment powers Congress may abrogate states' eleventh amendment protections). See also *Palmore v. United States*, 411 U.S. 389 (1973) (discussing Congress' authority over the District of Columbia under which it can deal with subjects which would otherwise exceed its powers). Justice Brennan recently argued, in dissent, that Congress' extensive power over military affairs should not preclude a *Bivens* action any more than should its other article I powers. *United States v. Stanley*, 107 S. Ct. 3054, 3066, 3077 (1987).

97. See, e.g., *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 257 (1982) (*Northern Pipeline* was the first instance in which the Supreme Court limited congressional authority to assign adjudicative authority to legislative tribunals).

98. 426 U.S. 833 (1976).

99. *National League of Cities* utilized the concept of attributes of state sovereignty as a check on Congress. There are obvious similarities between this approach and one that relies on a notion of core judicial authority or essential attributes of judicial power. See, e.g., Resnik, *supra* note 25, at 602–03.

What, after all, are the alternatives to some form of *Northern Pipeline* doctrine? One might—as seems to be the case with federalism-based limits after *Garcia*—abandon any attempted constraint and leave the choice of adjudicative mechanisms entirely to Congress.<sup>100</sup> Alternatively, one could take the position that the availability of appellate review in an article III court always satisfies that constitutional provision. Beyond these positions, there is the possibility of case by case balancing, although it is difficult to articulate a formulation under which Congress' choice of adjudicative mechanism would ever be overturned. Strong legislative interest can always be found in whatever underlying program is involved. Justice Brennan's approach, however tentative, does go further.

Thus *Northern Pipeline* emerges as a first cut, with the inevitable flaws and false starts. Whether a *Northern Pipeline* doctrine ultimately takes hold will depend on how much importance article III adjudication enjoys in the constitutional scheme. A preliminary question is whether it protects individual or structural interests.<sup>101</sup> Justice Brennan never addresses this question directly. Apart from a reference to the role of consent,<sup>102</sup> his opinion focuses on structure.<sup>103</sup> If article III, however, does protect both kinds of interests that would underscore the importance of a *Northern Pipeline* doctrine. If one takes the view that the primary role of judicial review is the protection of individual rights,<sup>104</sup> the case for a strict approach seems particularly strong at first blush. However, the question again arises why appellate review is not sufficient to provide that protection. As for the initial stage, it is not hard to view the independent adjudication to which Justice Brennan refers as an individual litigant's right. The right to an article III court, however, may not come from article III itself; it is the due process clause to which one looks for the guarantee of fairness in governmental decisionmaking.<sup>105</sup> If the only fair forum is a judicial one, the due process clause should be sufficient to command that result. If due process is satisfied it is hard to see, from the individual litigant's point of view, what article III adds. There may be claims, such as constitutional issues, which require a judicial forum at some point.<sup>106</sup> In these cases, it seems to be the structural value of preserving the courts' role as final interpreters of the Constitution which predominates as far as article III is concerned.

Structural provisions may, of course, further the enhancement of individual rights and liberties. One example is the Constitution's retention of a federal system. The presence of states as competing sovereigns helps achieve this end by furnishing

---

100. See Strauss, *Formal and Functional*, *supra* note 95, at 491–92, 514.

101. See, e.g., Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947, 1952–54 (1984) [hereinafter Harvard Magistrate Note].

102. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 79–80 n.31 (1982).

103. E.g., *id.* at 57–60.

104. See generally J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

105. See, e.g., Harvard Magistrate Note, *supra* note 101, at 1953; *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 117 (1982) (White, J., dissenting). But see Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297, 306–07 (1981) [hereinafter Krattenmaker] (due process guarantee of fairness “does not protect the full range of values sheltered by article III”). Having in place a judiciary which incorporates such values as “the appearance of fairness,” independence and integrity may benefit society at large, including those citizens who do not actually use it. *Id.* at 306. However, adjudicative mechanisms which satisfy due process considerations may also incorporate these values and provide the same benefit.

106. See, e.g., Redish, *supra* note 4, at 224–26.

alternative systems of protection, as well as by providing a range of opportunities for individual self-realization.<sup>107</sup> Similarly, separation of powers serves to prevent aggrandizement of the political branches and preserves the goal of limited government. As far as the courts are concerned, this is done primarily through their role as enforcers of the Constitution. The debate over *Northern Pipeline*, however, is not over the federal courts' power to pass on constitutional questions at some point; the key question is whether preserving a role for article III courts as *initial adjudicators* is of constitutional significance.

For Justice Brennan, the answer is yes. A satisfactory defense of this position may require something more than reliance on the intent of the framers. A possible general justification is that to be truly effective the national judiciary must be seen as the primary federal dispute resolution mechanism, and that this perception requires involvement in a significant number of cases at every stage of adjudication. The colloquial expression "making a federal case" out of something captures and reflects this perception. To stand up to the political branches as an equal, the federal judiciary must, in its own right, be playing an equally important role in the day to day business of government. The *Northern Pipeline* doctrine guards against a gradual erosion of this position.

The quintessential example of standing up to the political branches (those of the states as well as the national government) is the striking down of government action as violative of the Constitution.<sup>108</sup> As Professor Resnik points out, it is often stated that the salary and tenure guarantees of article III ensure the courts' ability to perform this checking function.<sup>109</sup> She suggests the Court's desire to prevent the erosion of article III, illustrated by its decision in *Northern Pipeline*, rests upon "a deep-seated myth about the role of judges."<sup>110</sup> She invokes the tale of Lord Coke deciding against the claimant favored by the King and argues that "the Court provides article III judges with the capacity to review executive and congressional action in a diverse set of arenas and to enforce decisions at odds with the 'King.'"<sup>111</sup> The concept of decisions that displease the King may go beyond constitutional review, although it certainly includes such review. Nevertheless, there remains the question of why appellate review could not perform this function, and why the core of judicial power must, according to Justice Brennan, include matters such as state-created rights and admiralty matters.<sup>112</sup> Deferential appellate review may not be enough when the lower tribunal is in a position to shape a case or is inherently biased in one direction.<sup>113</sup> But

---

107. See, e.g., Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 108-09.

108. This may be done either to enforce structural limitations or guarantees of individual rights.

109. Resnik, *supra* note 25, at 588. As she points out, these guarantees are also thought to preserve independent adjudication.

110. *Id.* at 611.

111. *Id.* at 612.

112. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 70-71 n.25 (1982).

113. See, e.g., Resnik, *supra* note 25, at 600-01 (possibility of agency loyalty to statutory schemes), 616 (ability of first tier decisionmakers to shape cases); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 85-86 n.39 (1982).

why should the irreducible core of article III include matters most unlikely to displease the King?<sup>114</sup>

A possible, and complementary, answer lies in the courts' general role as dispute resolvers. Throughout our national history the Supreme Court has stressed that judicial review is legitimate only because it is a necessary part of dispute resolution. The famous quote from Chief Justice Marshall that "it is emphatically the province and duty of the judicial department to say what the law is . . ." <sup>115</sup> is followed by this sentence: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." <sup>116</sup> It is the judiciary's role as decider of "particular cases" that legitimizes this specific, ultimate power. *Northern Pipeline* is aimed at preserving that broader role.

As a functional matter, it may also be important not to elevate the federal judiciary to the distant level of appellate review only. Viewed as a single institution, Justice Brennan seems to be saying, the federal judiciary draws its strength from experience with all facets of cases and a variety of subject matters. Closely related to this argument is the view that the generalist nature of the federal courts is a source of their strength and prestige.<sup>117</sup> That nature is at risk if Congress can continually syphon off matters.

An additional point in favor of the plurality opinion in *Northern Pipeline* is its relative fidelity to the wording of article III. Even if absolutism is not possible, adherence to the constitutional text is an important value in and of itself. This seems particularly true in the case of the document's structural provisions.<sup>118</sup> These are designed to provide an institutional framework within which government performs. That performance may vary and may include the protection of rights established elsewhere in the Constitution's "open-ended" provisions. However, the structure provides a set of known and agreed upon rules which can and ought to remain constant, thereby reinforcing the legitimacy and acceptability of changing outcomes.

There is, finally, the important matter of the spirit of article III, and in particular the Madisonian compromise which gave Congress the choice whether or not to create a system of lower federal courts, including the decision of the extent of those courts' authority. Federalism concerns might cause Congress to leave virtually everything to the state courts. Nationalism concerns, such as those which prevailed after the Civil War, point in the other direction. Extensive use of non-article III adjudicative bodies allows Congress to finesse the Madisonian compromise by sidestepping both the state and the federal courts. The states lose their role as primary adjudicators of disputes, but not in favor of the constitutionally prescribed alternative — article III courts.<sup>119</sup>

---

114. Professor Resnik blunts this objection to some extent by including within the category of decisions potentially displeasing to the King those involving "major social policy issues . . ." Resnik, *supra* note 25, at 615. However, Justice Brennan's notion of core judicial matters goes considerably further.

115. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

116. *Id.*

117. See Resnik, *supra* note 25, at 600-01.

118. See, e.g., *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47 (1948) (Frankfurter, J., dissenting); Krattenmaker, *supra* note 105, at 311.

119. An argument along these lines was advanced in *Schor*, but was rather summarily dismissed by the Court. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3261-62 (1986).

Of course, literalism and fidelity to constitutional history sometimes collide with the perceived exigencies of modern government. Such a collision may have stopped the *Northern Pipeline* doctrine in its tracks.

## II. SECOND THOUGHTS—THE HASTY RETREAT FROM *NORTHERN PIPELINE*

### A. Thomas—*Deference to Congressional Choice of Adjudicative Methods*

Litigants and judges saw at once that *Northern Pipeline* might require striking down a range of non-article III adjudication schemes. The lower courts showed some receptivity to these arguments.<sup>120</sup> The law appeared to be in the early stages of development after a landmark case has broken new but uncertain ground; much would hinge on clarification and elucidation from the Supreme Court. Three years after *Northern Pipeline*, the Court spoke in very ambiguous tones, casting some doubt on that case's status as the source of a new doctrine.

*Thomas v. Union Carbide Agricultural Products Co.*<sup>121</sup> was a challenge to a scheme of mandatory arbitration with limited judicial review. This scheme is part of the complex system for regulating pesticides.<sup>122</sup> Manufacturers must register pesticides with the Environmental Protection Agency, and must support the application with relevant data. Problems had arisen when later applications were based in part on data previously submitted by another manufacturer. Congress determined that the original submitter should receive compensation for such "follow-on" use. However, the E.P.A. found the task of determining the value of data so time consuming that the entire system became seriously bogged down. In response, Congress created the arbitration scheme, under which, for certain pesticides,<sup>123</sup> either applicant can request binding arbitration if there is no agreement between them as to the amount of compensation. A court can review the arbitrator's decision only for "fraud, misrepresentation, or other misconduct." Several pesticide manufacturers challenged the scheme on various grounds. Relying on *Northern Pipeline*, the district court invalidated the mandatory arbitration scheme.<sup>124</sup>

The Supreme Court reversed. Justice O'Connor's majority opinion is a curious blend of the contrasting analyses offered by the *Northern Pipeline* plurality and dissent. The precise holding in *Northern Pipeline* is not an obstacle to the arbitration scheme's validity, since *Northern Pipeline* involved adjudication of state law matters.<sup>125</sup> The relationships among pesticide data submitters are governed by federal law. The question is whether the matters the arbitrator will decide constitute a private right or a public right.<sup>126</sup> Admittedly the dispute is between two private parties;

---

120. See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 576 (1985).

121. 473 U.S. 568 (1985).

122. The Federal Insecticide, Fungicide, & Rodenticide Act, 7 U.S.C. § 136. See generally *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571-74 (1985).

123. For data submitted after September 30, 1978 the submitter was given a ten year period of exclusive use during which the data could not be utilized by anyone else without the original submitter's permission.

124. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 576-78 (1985).

125. *Id.* at 584.

126. *Id.* at 585-89.

nevertheless, Justice O'Connor finds that the underlying issues are more like a public right. The whole dispute arises out of a congressionally created regulatory scheme, and Congress could have assigned any compensation issues to the agency in order to "allocate costs and benefits among voluntary participants in the program without providing an [a]rticle III adjudication."<sup>127</sup>

Use of the public rights doctrine sounds like *Northern Pipeline*. But Justice O'Connor turns it into a form of balancing that combines Justice White's dissenting approach with Justice Brennan's test for the use of adjuncts. The two principal variables are "the origin of the right at issue . . . [and] the concerns guiding the selection by Congress of a particular method for resolving disputes."<sup>128</sup> The fact that the compensation dispute does not arise directly between the government and the manufacturers is not determinative. The matter became one of public right because Congress created the right—as opposed to replacing a state law cause of action or controlling its adjudication—and because it was part of a complex regulatory scheme which was on the verge of breaking down.

At first it appears that this sliding scale operates subject to an ultimate requirement of some "degree of judicial involvement . . . ."<sup>129</sup> However, Justice O'Connor later states that "the requirements of [a]rticle III must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas."<sup>130</sup> This statement—a summary of the holding in *Palmore v. United States*<sup>131</sup>—is ambiguous in its possible limitation to some subject areas. However, the reference to "proper circumstances" suggests that a sufficiently strong congressional interest will always win in terms of the placement of initial adjudication. This type of balancing is very close to what Justice White advocated in *Northern Pipeline*.<sup>132</sup> Like Justice White, Justice O'Connor places reliance on the limited availability of article III appellate review to satisfy the article III values. As she interprets the statute, questions involving the Constitution and the arbitrator's power under "the governing law" will come before a court.<sup>133</sup>

Thus, the seemingly a priori notion of public rights has been infused with considerable flexibility. The entire tone of Justice O'Connor's opinion is certainly closer to the *Northern Pipeline* dissent than to the plurality opinion. Although article III protects important values, "[a]n absolute construction of . . . [it] is not possible . . . ."<sup>134</sup> The routine practice of administrative adjudication reflects the Court's substantial deference to Congress. Of particular importance is her implicit criticism of *Northern Pipeline* in the rejection of any "bright line" test and the call for "practical attention to substance rather than doctrinaire reliance on formal

---

127. *Id.* at 589.

128. *Id.* at 587.

129. *Id.*

130. *Id.* at 590-91.

131. 411 U.S. 389 (1973). See *supra* text accompanying note 74.

132. See M. REDISH, *FEDERAL COURTS*, 1986 SUPPLEMENT 83 (asking whether the *Thomas* Court has adopted Justice White's test).

133. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985).

134. *Id.* at 583.



categories . . . ."<sup>135</sup> As a methodological matter, it is precisely such rigidity that makes a *Northern Pipeline* doctrine, at least one with impact, possible.

Justice Brennan, thus, found himself in something of a dilemma, which he resolved temporarily by concurring in the *Thomas* judgment.<sup>136</sup> His opinion insists that the public rights doctrine, as enunciated in *Northern Pipeline*, is the correct approach, and that on these facts it leads to upholding the statute. He describes the public rights doctrine as a flexible standard which allows Congress leeway in structuring adjudicative mechanisms. He demonstrates that flexibility by reasoning that the concept of disputes "between the government and others"<sup>137</sup> is really quite a broad one: it extends to "disputes arising from the federal government's administration of its laws or programs."<sup>138</sup> The identity of the parties is not the key; the relationship of the government to the dispute is. In *Thomas*, the government is heavily involved. Justice Brennan even treats the arbitration as part of the overall administrative process for regulating pesticides.<sup>139</sup>

Thus redefined, the public rights approach places in this category a wide spectrum of federally created rights and duties between private parties which flow from the use of administrative agencies to handle particular subject matters. The danger of tautology is obvious. Public rights cases are those which arise "in the administration of federal regulatory programs,"<sup>140</sup> and what administrative agencies may adjudicate is determined by the presence of public rights.

Despite his insistence on flexibility, Justice Brennan does not portray the public rights doctrine as toothless. Instead, he suggests that the availability of appellate review satisfies the dictates of article III when public rights are involved.<sup>141</sup> This is a shift in focus from the general adjudicatory role of article III courts to their "checking" function.<sup>142</sup> It is this checking function which keeps the political branches from overstepping their bounds. Justice Brennan's double retreat permits him to treat *Northern Pipeline* as alive and well, and the majority at least pays it lip service. One year later, the Court came a step closer to outright repudiation.

#### B. Schor—Administrative Adjudication of "Core" Judicial Matters

*Commodity Futures Trading Commission v. Schor*<sup>143</sup> was another case in which the lower court relied on *Northern Pipeline* to restrict non-article III adjudication. At issue was the Commission's authority to hear state law counterclaims by brokers when customers brought claims before it to redress violations of the Commodity Exchange Act or Commission regulations. Congress had provided this administrative

135. *Id.* at 587.

136. *Id.* at 594.

137. *Id.* at 597 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 69 (1982)).

138. *Id.* at 596.

139. *Id.* at 599.

140. *Id.* at 596 n.1.

141. *Id.* at 599.

142. Compare *id.* at 594, 599 (importance of checking function) with *Northern Pipeline*, 458 U.S. 50, 86 n.39 (function of judiciary not limited to keeping "the other two Branches in check . . .").

143. 106 S. Ct. 3245 (1986).

reparations procedure to give aggrieved customers an expeditious alternative to judicial resolution of their claims. The Commission had added the counterclaim procedure by regulation. The Court of Appeals for the District of Columbia Circuit held that because *Northern Pipeline* cast serious constitutional doubt on jurisdiction over state law counterclaims, the statute authorizing the reparations procedure should not be construed to authorize the counterclaim regulation.<sup>144</sup> By a margin of seven to two, the Supreme Court reversed.<sup>145</sup> In an opinion by Justice O'Connor, the Court held that Congress had authorized the counterclaim jurisdiction, and that article III did not prevent it from doing so.

The opinion, like that of Justice Brennan in *Northern Pipeline*, is an attempt to reformulate the constraints which article III imposes on Congress, based on an assessment of article III's role in the constitutional scheme. Justice O'Connor views article III as protecting both the structural value of separation of powers and the individual's right to impartial and independent adjudication.<sup>146</sup> For her, the latter is article III's primary function.<sup>147</sup> Such personal rights can, however, be waived, and the customer in *Schor* had done so.<sup>148</sup> He had initiated the administrative proceeding with full knowledge of the counterclaim possibility, and had urged dismissal of a suit by the broker presenting this claim on the ground it could be heard before the agency. But his consent could not obviate the need to consider the bearing of article III as a structural imperative.<sup>149</sup> The relevant structural principle is that of separation of powers/checks and balances: preventing "the encroachment or aggrandizement of one branch at the expense of the other."<sup>150</sup> Congress cannot act to "emasculate" the judicial branch.<sup>151</sup> These statements are not a radical departure from anything said in *Northern Pipeline*.

What is new is Justice O'Connor's reformulation of the "pragmatic" approach she had espoused in *Thomas*. She now identifies three factors as the primary guides to determine whether Congress could "authorize the adjudication of [a]rticle III business in a non-[a]rticle III tribunal . . . ."<sup>152</sup> These are, first, "the extent to which the 'essential attributes of judicial power' are reserved to [a]rticle III courts;" second, "the origins and importance of the right to be adjudicated;" and third, "the concerns that drove Congress to depart from the requirements of [a]rticle III."<sup>153</sup> (The second and third factors appeared in *Thomas* as a guide for identifying public rights.) This three factor test is obviously very malleable. The third factor incorporates the deference to Congress inherent in Justice White's balancing approach. The

---

144. 770 F.2d 211 (1985).

145. 106 S. Ct. 3245 (1986).

146. *Id.* at 3256.

147. *Id.* The guarantee of independent and impartial adjudication by the federal judiciary "serves to protect primarily personal rather than structural interests."

148. *Id.* at 3256-57.

149. *Id.* at 3257-58.

150. *Id.* at 3257 (quoting *Buckley v. Valeo*, 424 U.S. 122 (1976)).

151. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3257 (1986) (quoting *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 644 (1946) (dissenting opinion)).

152. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3258 (1986).

153. *Id.* These factors are presented as a guide to the ultimate question of "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." No other factors are mentioned.

first and second factors, although ambiguous, suggest elements of a core or zone approach that can impose definite constraints. As applied by Justice O'Connor in *Schor*, however, this "pragmatic" test is one which Congress will almost always win, at least if it has provided appellate review in an article III court.

The first factor is, she states, easily satisfied because the Commission's powers are basically an example of "the traditional agency model . . ."<sup>154</sup> The one difference is the counterclaim jurisdiction, but this does not alter the role which article III courts play vis-à-vis the agency. If a party does not comply with an order, that noncompliance triggers a judicial proceeding for enforcement, which proceeding utilizes the weight of the evidence standard for issues of fact and de novo review for questions of law.<sup>155</sup> In addition to the availability of judicial review, the Commission's counterclaim jurisdiction adheres to the agency model because it has a limited subject matter area—violations of the Commodity Exchange Act—as opposed to the broad jurisdiction of the bankruptcy courts in *Northern Pipeline*.<sup>156</sup> In other words, invocation of the agency model seems to validate any assignment of matters to a specialized non-article III body as long as there is some appellate review, no matter how deferential. (Justice O'Connor had earlier stated that the agency's expertise is "superior to that of a court" in construing the agency's own statute.)<sup>157</sup> So much for the first factor.

The second factor—restated as "the nature of the claim"<sup>158</sup>—might have been expected to be more troublesome. The broker's private state law claim for its commissions seems on a par with the contract claim in *Northern Pipeline*, part of the core of article III judicial power. However, Justice O'Connor first insists that *Thomas* rejected any notion that the distinction between public and private rights should be determinative of congressional power.<sup>159</sup> (One can only wonder why her opinion in that case went to some lengths to apply the distinction.) Similarly, she argues the distinction between state law and other claims should not be "talismanic."<sup>160</sup> The answer to questions of Congress' power is not to be found in any notion of core article III matters, but through examination of separation of powers concerns.<sup>161</sup> The Court must inquire whether Congress has improperly encroached on the judicial branch. There is a greater risk of this encroachment when Congress has removed from article III adjudication a traditional common law matter. Thus a stricter scrutiny is called for, as Justice Brennan had said in dealing with adjuncts. (In this context, however, he was dealing with whether essential attributes of judicial power had been retained.) In this case, there is no threat to the separation of powers. The jurisdiction over state law matters is an incident of the agency's general, valid power over commodity related

---

154. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3258 (1986).

155. *Id.* at 3259.

156. *Id.* at 3258–60.

157. *Id.* at 3255.

158. *Id.* at 3259.

159. *Id.*

160. *Id.*

161. *Id.*

matters, and there is some judicial control.<sup>162</sup> Thus the subject matter really does not make much more difference than the mode of adjudication. Finally, Justice O'Connor suggests that any threat to the separation of powers is further tempered by the fact that the party with the state law claim retained the option of bringing it before a court, although it would seem that federal court jurisdiction would require diversity of citizenship.<sup>163</sup>

Even before considering the third factor, one is forced to ask whether *Northern Pipeline* would have any bite left. Justice O'Connor invokes it by raising the following hypothetical possibility: creation by Congress of "a phalanx of non-[a]rticle III tribunals equipped to handle the entire business of the [a]rticle III courts without any [a]rticle III supervision or control and without evidence of valid and specific legislative necessities . . ." under which litigants would retain the option of recourse to courts.<sup>164</sup> Such a scheme would be questionable, she suggests. Again, however, appellate review might save it, given the reference to supervision and control.

The reference to legislative necessities shows that the third *Schor* factor—the concerns that drove Congress to depart from article III—has potentially great reach. As the analysis in *Schor* shows, Congress can seemingly always justify its use of non-article III tribunals by showing some programmatic need. In applying the third factor Justice O'Connor cites agency expertise and the need to make the reparations scheme effective and workable.<sup>165</sup> Such concerns will always be present.

In sum, it is likely that in any individual case the three factor test will tilt decisively toward Congress, much like Justice White's balancing approach which it closely resembles. Responding to Justice Brennan, Justice O'Connor argues that prophylactic concerns do not require a stricter approach;<sup>166</sup> the test as formulated can prevent erosion of the judicial branch. In a potentially significant passage she notes that mechanisms similar to those in *Schor* do not constitute aggrandizement of Congress' power at the judiciary's expense.<sup>167</sup> The only question is whether the judicial role has been undermined. The clear implication is that such a dilution, by itself, does not greatly threaten the separation of powers or anything else in the Constitution.

All of this was too much for Justice Brennan who, joined by Justice Marshall, dissented.<sup>168</sup> He agreed generally with the majority about the twin goals of article III—preservation of separation of powers/checks and balances and the protection of individual litigants' rights.<sup>169</sup> His disagreement on how to achieve these goals can be summarized in four key points.

---

162. *Id.* at 3260.

163. Justice O'Connor states that "the power of the judiciary to take jurisdiction of these matters is unaffected." *Id.* The broker's claim for commissions due would seem, however, to arise under state law, thus alleviating possible general federal question jurisdiction under 28 U.S.C. § 1331.

164. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3260 (1986).

165. *Id.* at 3254, 3260.

166. *Id.* at 3261.

167. *Id.*

168. *Id.* at 3262.

169. *Id.* at 3262–63. Justice Brennan treats the two sets of interests as "inseparable" and "coextensive." Thus any waiver or consent to non-article III adjudication, such as that by the *Schor* plaintiff, is "irrelevant to [a]rticle III analysis."

First, the danger to be avoided is erosion of article III.<sup>170</sup> This is likely to occur on a gradual basis rather than in one fell swoop. Thus, the Court must take a prophylactic approach. A case by case treatment presents serious dangers of dilution since the threat in any particular congressional scheme will be slight.

The proper analytical framework is one which relies on a core approach such as that utilized in *Northern Pipeline*.<sup>171</sup> This core is best preserved by adhering to the presumption in favor of article III adjudication and treating the exceptions which *Northern Pipeline* recognized as narrow ones. The Court should hold the line rather than "extend further these exceptions to situations that are distinguishable from existing precedents."<sup>172</sup>

The majority's alternative approach, essentially based on balancing notions, is fraught with danger of erosion.<sup>173</sup> Introducing the weight of the legislative interest as a variable to be considered in each case tilts the balance in Congress' favor: "The Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case."<sup>174</sup>

Finally, Justice Brennan integrates consideration of the article III cases with the Court's other recent separation of powers decisions.<sup>175</sup> His is the first opinion in the *Northern Pipeline-Thomas-Schor* trilogy to do so.<sup>176</sup> Both the tone and the result in *Immigration & Naturalization Service v. Chadha*<sup>177</sup> (the legislative veto case) and *Bowsher v. Synar*<sup>178</sup> (the Balanced Budget Act case) cut in his favor. The Court in those cases, relying on a formalistic approach to separation of powers, struck down mechanisms for governmental convenience in favor of the framers' choice of processes that today "often seem clumsy, inefficient, even unworkable . . . ."<sup>179</sup> According to Justice Brennan, the Court should take the same approach in article III separation of powers cases. The fact that he dissented and the content of his opinion raise the question of whether *Northern Pipeline* is still good law, let alone the foundation of a major new doctrine.

### C. *What's Left of Northern Pipeline?*

The Court has not overruled *Northern Pipeline*. Distinctions between it and the subsequent cases are of course possible, even if tenuous. One important difference for Justice O'Connor is that the bankruptcy judges handled a wider range of matters than the *Thomas* arbitrator or the *Schor* Commission.<sup>180</sup> Nevertheless, it is possible to characterize the bankruptcy judges as also limited to a specialized area: bankruptcy

---

170. *Id.* at 3263, 3265-66.

171. *Id.* at 3263-64.

172. *Id.* at 3263.

173. *Id.* at 3264.

174. *Id.*

175. *Id.* at 3264-65.

176. Many commentators have done so. *E.g.*, Strauss, *Formal and Functional*, *supra* note 95, at 496-510.

177. 462 U.S. 919 (1983).

178. 106 S. Ct. 3181 (1986).

179. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983).

180. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3258 (1986).

matters.<sup>181</sup> The relationships between the initial adjudicator and the article III reviewing court do not seem all that different in the three cases. A high degree of deference on matters of fact and law is likely; the key determinations will be those made at the initial, non-article III level. One obvious distinction is that *Thomas* and *Schor* involved administrative agencies, while *Northern Pipeline* did not. This is important, not because of anything in the appellate court-initial adjudicator relationship, but because adjudication is only one part of the agency's programmatic responsibilities. (In *Thomas* the arbitrator, not the agency, performed the adjudication but his work was closely related to the agency's registration responsibilities.) The Court defers, then, not only to Congress' specific choice of an adjudicatory mechanism but to the spectrum of choices it has made about how to regulate the entire subject.

Still, the question arises as to why the Court did not overrule *Northern Pipeline*. Perhaps it did the functional equivalent by replacing the *Northern Pipeline* analysis with one which will always come out the other way—in favor of the congressional choice. This is what initially happened in *National League of Cities v. Usery*.<sup>182</sup> That case delineated an apparent core of state sovereignty which Congress could not invade, except in the exercise of fourteenth amendment powers.<sup>183</sup> Although its precise methodology was not easy to formulate, *National League of Cities* appeared to have bite: the potential to strike down acts of Congress. Rather than overrule it, initially at least, the Court reformulated the *National League of Cities* approach into an elaborate multifactor test, with a balancing component, which the states could never win.<sup>184</sup> Justice O'Connor's three factor approach articulated in *Schor* appears to produce the same result. Appellate review pretty much provides the essentials of the judicial power. Since even state created rights can satisfy the scrutiny given to non-article III tribunals, such adjudication of federally created rights seems to be home free. Finally, the need to respect Congress' ability to respond to programmatic imperatives will override any lingering obstacles.

*Northern Pipeline's* continuing force may turn largely on the importance the Court attaches to the use of article III courts as initial adjudicators at least some of the time. Justice O'Connor cites the need for impartial and independent adjudication as an article III value. The due process clause may adequately protect the individual rights in question without recourse to article III. More to the point, Congress is not likely to use mechanisms which threaten these rights. It is hard to point to any form of political domination, even potential, over the adjudication in any of the three

---

181. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 117–18 (1982) (White, J., dissenting) (treating bankruptcy courts as “specialized” courts).

182. 426 U.S. 833 (1976).

183. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

184. *Hodel v. Virginia State Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287–88 and n.29. Under *Hodel* a state challenge to federal commerce power legislation must meet each of three requirements: first, the statute must regulate the “states as states;” second, the federal activity must address matters that are indisputably “attributes of state sovereignty;” third, states’ compliance would have to directly impair their ability to “structure integral operations in the area of national governmental function.” To these requirements the Court added an apparent balancing test. A state challenge might meet them and still fail in “situations in which the nature of the federal interest advanced may be such that it justifies state submission.”

cases. The arbitrators came from a list,<sup>185</sup> and the Commodities Futures Trading Commission was designed to be immune from political pressure.<sup>186</sup> Indeed, the general judicialization of the administrative process furthers independent and impartial adjudication. It is true that bankruptcy judges were appointed for terms of years, and their salaries could be diminished.<sup>187</sup> Nevertheless, it is unlikely that these factors would have a bearing on a particular case. There may be specific cases where the initial adjudicator can so shape the dispute as to frustrate meaningful appellate review,<sup>188</sup> but it would seem that enforcing the Constitution through appellate review will generally be effective in preventing aggrandizement or other wrongdoing by the political branches.<sup>189</sup> Without some further justification for its emphasis on the initial role of article III courts, such as those suggested above,<sup>190</sup> *Northern Pipeline* loses much of its force. Other factors may, however, be at work in the Court's downgrading of *Northern Pipeline*.

### III. THE RETREAT IN CONTEXT—SEPARATION OF POWERS ANALYSIS AND BURGER COURT ATTITUDES TOWARD ARTICLE III COURTS

To the extent there ever was a *Northern Pipeline* doctrine based on a notion of core judicial matters in which an article III court must play more than an appellate role, it had several inherent weaknesses. For one thing, the Court was obviously reluctant to embark on a road that would call into question the validity of administrative agencies.<sup>191</sup> As a practical matter, the Justices may have concluded that measures which keep the federal court caseload from expanding are not all that bad.<sup>192</sup> But problems at the doctrinal level also impeded the development of *Northern Pipeline*. Several of these have been discussed above,<sup>193</sup> for example Justice Brennan's reliance on the public rights concept. Finally, the extreme difficulty in formulating a workable test may raise questions about the validity of the whole enterprise. All of these explanations have weight. There are, however, general themes in Burger Court doctrine which shed further light on the retreat from *Northern Pipeline*.

#### A. Separation of Powers and Formalistic Analysis

*Northern Pipeline* and its successors coincided with the reliance on a highly formalistic approach to separation of powers issues which guided the Court's two major recent decisions in this area: *Immigration & Naturalization Service v. Chadha*<sup>194</sup> and *Bowsher v. Synar*.<sup>195</sup> In *Chadha* the Court struck down the legislative

185. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 574–75 n.1 (1985).

186. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3250 (1986).

187. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 53 (1982).

188. Resnik, *supra* note 25, at 616.

189. *But see* Krattenmaker, *supra* note 105, at 307 (rejecting arguments based on sufficiency of appellate review).

190. *See supra* notes 108–17 and accompanying text.

191. *See, e.g.*, *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 74–75 n.28 (1982).

192. *See, e.g.*, Strauss, *Formal and Functional*, *supra* note 95, at 515.

193. *See supra* text accompanying notes 87–97.

194. 462 U.S. 919 (1983).

195. 106 S. Ct. 3181 (1986).

veto mechanism, holding that such a device was the enactment of law without conformity to the specific provisions of article I governing how Congress is to make laws. In *Bowsher*, the Court struck down a delegation of substantial authority over the federal budget to the Comptroller General on the ground that Congress had too much power to remove an official performing executive functions. Both cases took a relatively absolutist approach to constitutional language and structure. They relied heavily on the intent of the framers to create a particular model of government, and rejected arguments for deviating from that model on grounds of convenience, efficiency, and necessity.<sup>196</sup>

These decisions have been sharply criticized, particularly on methodological grounds.<sup>197</sup> The critics have faulted the Court for relying unduly on formalistic notions of separation of powers instead of focusing on the functional aspects of that doctrine, in particular preserving checks and balances and maintaining the necessary tensions among the branches.<sup>198</sup> These goals, it is asserted, can be achieved without seeking refuge in literalism. *Northern Pipeline*, especially the plurality opinion, takes very much the same approach. Indeed, some critics have grouped it with the other separation of powers cases, and taxed it with the same shortcomings.<sup>199</sup>

Thus, it is tempting to view *Thomas* and *Schor* as the beginning of a general rethinking by the Court of its approach to separation of powers issues.<sup>200</sup> Justice O'Connor's majority opinions in those two cases abjure bright line tests, reject literalism, and emphasize "practical attention to substance rather than doctrinaire reliance on formal categories . . . ."<sup>201</sup> Once again, there is a parallel between the article III cases and post-*National League of Cities* developments. In the *National League of Cities* context the Court also moved away from the apparent formalism of its original decision, which rested in part on notions of zones of state autonomy, to a pragmatic approach balancing state and national interests.

One could picture the Court as in flux over how to approach separation of powers cases, with *Thomas* and *Schor* representing one end of the spectrum and *Bowsher*, *Northern Pipeline*, and *Chadha* representing the other end. The problem with this explanation is that *Schor* and *Bowsher* were decided on the same day, and Justice O'Connor's opinion in the former case insists that it is consistent with the latter.<sup>202</sup> The same Justices are formalistic in some separation of powers cases—those involving articles I and II—and functional in those cases involving article III.<sup>203</sup> Do the two groups of cases in fact present different separation of powers issues?

Justice O'Connor assayed an affirmative answer in *Schor*: "Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the

196. E.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983).

197. E.g., *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 185, 189-90 (1983).

198. E.g., *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 100, 220, 228 (1986).

199. *Id.* at 227. See also Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 504 (1987) (formalism "poorly suited to allocating adjudicative functions between courts and agencies.") [hereinafter Bruff].

200. *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 100, 228 n.68 (1986).

201. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985).

202. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3261 (1986).

203. See Strauss, *Formal and Functional*, *supra* note 95, at 489.



expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own powers, the role of the Judicial Branch."<sup>204</sup> In other words, there is no great danger to structural values when Congress simply transfers some matters from article III courts to alternative adjudicative bodies. Professor Peter Strauss has argued that such an interpretation helps explain the difference in approach between the article III and the article I and II cases.<sup>205</sup> In particular, he contends that subtraction of the judicial branch's power in favor of an administrative agency poses little threat to equilibrium among the three branches because each branch has ceded some power to the agency.<sup>206</sup> For Strauss the only place for a formalistic approach (and even here he has doubts) is cases where there is a direct clash between the branches.<sup>207</sup>

There is no such clash in the article III cases. There, typically, a private litigant finds it in his or her interest to raise structural considerations because they may work to get the case dismissed or an undesirable result nullified.<sup>208</sup> In the article I and II cases, on the other hand, the political branches are likely to be parties or are likely to intervene or otherwise seek to protect their interests.<sup>209</sup> In these cases a political separation of powers dispute is being reenacted in the courtroom. In the article III cases it is likely that no such dispute ever occurred in the first place; that is, the underlying legislative scheme is not an attempt to sap or erode the judicial branch. Given the difference, there is something to be said for a more flexible attitude, or so the Court may have concluded.

Nevertheless, the same approach could have been taken in *Northern Pipeline*. It is hard to find any congressional aggrandizement in that case either. Conversely, a strict approach like that of *Bowsher* and *Chadha* could have been taken in *Thomas* and *Schor*. Article III can be given a literal reading just like those articles that precede it: if Congress is to create institutions which exercise the judicial power, they must be courts as described therein. The *Northern Pipeline* doctrine, strictly applied, ensures a tripartite system of government by guarding against erosion of the judicial branch, a less tangible threat than direct encroachment, but a real possibility nonetheless. Perhaps in *Thomas* and *Schor* the Court approached separation of powers cases based on subtle distinctions between aggrandizement and dilution, but an alternative (and complementary) explanation of *Northern Pipeline*'s demise is possible: for the current Court the judicial branch simply does not enjoy the same fundamental constitutional status as the political branches. That is why inroads on its

---

204. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3261 (1986).

205. Strauss, *Formal and Functional*, *supra* note 95, at 517-19.

206. *Id.*; accord Bruff, *supra* note 199, at 503.

207. See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

208. In *Northern Pipeline*, for example, the defendant's success in nullifying the entire structure of bankruptcy courts would not prevent the contract claim against it from being litigated in a state court or a properly reconstituted federal bankruptcy tribunal.

209. Thus, in *Bowsher*, the initial plaintiff was a Congressman, later joined by eleven others. *Bowsher v. Synar*, 106 S. Ct. 3181, 3185 (1986).

authority do not call for the same degree of judicial vigilance as do alterations of the balance of power between Congress and the President.

### B. *Burger Court Attitudes Toward the Article III Judiciary*

An important theme of Burger Court jurisprudence has been the need to limit the power and role of the federal courts and to guard against any expansion.<sup>210</sup> This attitude is most clearly seen in the numerous cases denying standing to plaintiffs who seek to challenge governmental action. The Court has increasingly sought to relate standing to the doctrine of separation of powers. Indeed, in *Allen v. Wright*,<sup>211</sup> the most recent general treatment of the subject, Justice O'Connor declared that "the law of [a]rticle III standing is built on a single basic idea—the idea of separation of powers."<sup>212</sup> This analysis goes beyond that of the Warren Court which recognized that separation of powers concerns are one component of the general article III notion of justiciability, but found that these concerns related to whether or not particular issues should be heard in an article III court, rather than to a party's standing to raise them.<sup>213</sup>

The separation of powers aspect of standing might simply dictate that article III courts remain within their prescribed boundaries by not allowing access to persons who fail to present cases or controversies.<sup>214</sup> The current Court sees standing as a means of avoiding incursions into the legislative and executive domains. In *Allen* the Court denied standing to plaintiffs who sought to restructure the Internal Revenue Service's enforcement of tax exemptions for private schools, largely because of the incursion on the executive branch that an affirmative decision would represent.<sup>215</sup> Justice O'Connor relied in part on the Constitution's assignment "to the Executive Branch, and not to the Judicial Branch, the duty to 'take care that the Laws be faithfully executed.'"<sup>216</sup> Taken to its extreme, this reliance would suggest that executive branch interpretations of the law are so superior that no judicial review of them is warranted. Clearly the majority is using standing as one means of restricting the judiciary's power over the political branches.<sup>217</sup>

Indeed, the notion of the courts' inferior status vis-à-vis the political branches' status seems to underlie the often repeated "concern about the proper and properly limited—role of the courts in a democratic society."<sup>218</sup> The actions of the political branches derive their legitimacy from a form of popular consent which the judiciary does not possess.<sup>219</sup> As Judge Robert Bork put it, a fundamental concern behind

---

210. See generally Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 Iowa L. Rev. 617, 625–27 (1984).

211. 468 U.S. 737 (1984).

212. *Id.* at 752.

213. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

214. *Allen v. Wright*, 468 U.S. at 783, 789–90 (1984) (Stevens, J., dissenting).

215. *Id.* at 759–61.

216. *Id.* at 761.

217. For a critique of *Allen v. Wright*, see Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. Pa. L. Rev. 635 (1985).

218. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

219. *United States v. Richardson*, 418 U.S. 166, 180, 188–91 (1974) (Powell, J., concurring).

standing as a separation of powers concept "appears to be the need to limit the role of the courts in the interplay of our various governmental institutions." The danger which standing helps guard against is that of a Supreme Court majority acquiring "something very like the power to govern the nation by continuously allocating powers and inhibitions to every other governmental institution."<sup>220</sup>

This concern with limiting the federal judiciary's power extends beyond the public law concept of standing. The Court has resisted attempts to broaden the domain of federal common law,<sup>221</sup> and has emphasized the fundamental difference between the limited jurisdiction of the federal courts and the much broader jurisdiction of the state courts.<sup>222</sup> A particularly influential statement of this general view is Justice Powell's dissenting opinion in *Cannon v. University of Chicago*.<sup>223</sup> He argued against a hospitable approach to implying rights of action under federal statutes as "an increase in the governmental power exercised by the federal judiciary."<sup>224</sup> He viewed implication of rights of action as affecting a broad range of persons and institutions, and concluded that separation of powers concerns dictate that "the issue [be] resolved by the elected representatives in Congress after public hearings, debate, and legislative decision. It is not a question properly to be decided by relatively uninformed federal judges who are isolated from the political process."<sup>225</sup> Justice Powell's opinion blends separation of powers analysis and the traditional notion of limited federal court jurisdiction<sup>226</sup> with the particular Burger Court theme of the federal judiciary's inferior lawmaking competence.<sup>227</sup> Justice Powell's views on the particular matter of implied rights appear to have prevailed,<sup>228</sup> although the issue is not free from doubt.<sup>229</sup> His general approach to federal judicial power is that of the current Court.

There are two aspects of the cases referred to in this subsection which assume particular importance for purposes of this Article. The first is that the result generally is that an article III court does not adjudicate the matter. If the plaintiff lacks standing there may be no judicial determination<sup>230</sup> or the matter may be remitted to the state courts.<sup>231</sup> Absent a private right of action, it may be remitted to an administrative agency.<sup>232</sup> (The various forms of abstention and the Court's reaffirmation of the

220. *Barnes v. Kline*, 759 F.2d 21, 41, 54 (D.C. Cir. 1985) (Bork, J., dissenting); *vacated sub nom. Burke v. Barnes*, 107 S. Ct. 734 (1987).

221. *E.g.*, *City of Milwaukee v. Illinois*, 45 U.S. 304 (1981).

222. *Cannon v. University of Chicago*, 441 U.S. 677, 717-18 (1979) (Rehnquist, J., concurring).

223. *Id.* at 730.

224. *Id.* at 743-44.

225. *Id.* at 731.

226. *Id.* at 730-31, 746 n.17.

227. *Cf. id.* at 748. *See, e.g.*, *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 739-40 (1979); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981); *Bush v. Lucas*, 462 U.S. 367, 389 (1983). *But cf.* *United States v. Leon*, 468 U.S. 897, 927-28 (1984) (Blackmun, J., concurring) (Despite "institutional limitations" on its ability to find facts, the Court must make empirical judgments about the deterrent effect of the exclusionary rule.).

228. *See, e.g.*, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 25 (1979) (Powell, J., concurring).

229. *See Brown*, *supra* note 210, at 629-35.

230. *See, e.g.*, *United States v. Richardson*, 418 U.S. 166, 179 (1974) (possibility that no person may have standing to challenge the nondisclosure of the Central Intelligence Agency budget).

231. This would be the case, for example, with the generalized challenge to exclusionary zoning practices in *Warth v. Seldin*, 422 U.S. 490 (1975).

232. *See, e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 748-49 (1979) (Powell, J., dissenting). In *Cannon*

eleventh amendment, both motivated by federalism concerns, produce the same result.) The second point is that the wing of the Court taking these positions is also that which has led the retreat from *Northern Pipeline*. It is the conservative Justices who downplay the role of the federal judiciary in favor of concerns of separation of powers and federalism. In the context of choice of an adjudicatory entity these same Justices have concluded that deference to Congress' going outside article III does not threaten important structural values. If the article III judiciary does not enjoy the same status as the political branches, erosion of its power and role, by definition, is of less concern, regardless of whether another branch is aggrandized.

Even so, it might be argued that fidelity to the constitutional text and preservation of some tripartite system are conservative arguments for Justice Brennan's position. But the text is ambiguous in that Congress is under no obligation to create the lower federal judiciary at all. Why should a branch whose very existence depends on the action of the other two merit the same level of constitutional status and protection? Arguments based on judicial co-equality cannot invoke the constitutional scheme in the same way that Congress (through article I) and the President (through article II) can.

It is true that the post-*Northern Pipeline* cases are not based on Congress' article III power to establish or not to establish lower federal courts.<sup>233</sup> Rather, the emphasis is on Congress' ability to create tribunals to implement article I powers. However, Justice White's majority opinion in *Palmore v. United States*,<sup>234</sup> an important forerunner of these cases, does rely heavily on the proposition that

the judicial power of the United States . . . is (except in enumerated instances applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.<sup>235</sup>

The Court apparently sees little danger in erosion of something which has such a tenuous claim to existence in the first place.

In sum, the retreat from *Northern Pipeline* seems less surprising than the fact that Justice Brennan got away with that case in the first place. Nevertheless, *Northern Pipeline* has not been overruled. Its dormant state creates a warning to Congress, however faint, that there are limits, and reserves to the Court a greater authority to enforce those limits than do the post-*Northern Pipeline* case-by-case balancing approaches. To illustrate the applicability of any remaining *Northern Pipeline* doctrine it may be helpful to examine briefly three pertinent areas.

---

itself, the private party complaining of sex-based discrimination in a federally funded program could trigger administrative proceedings through a complaint, but could not participate in them. *Id.* at 706 n.41.

233. Indeed, in *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3249 (1986), Justice O'Connor made a somewhat cryptic reference to the fact that when Congress authorized the counterclaim jurisdiction its focus was on effective regulation, "not on allocating jurisdiction among federal tribunals." *Id.* at 3260; see *infra* text accompanying notes 259-61.

234. 411 U.S. 389 (1973).

235. *Id.* at 401 (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

IV. TESTING THE VITALITY OF A *NORTHERN PIPELINE* DOCTRINE—THREE AREASA. *Administrative Adjudication*

When *Northern Pipeline* was handed down critics argued that it cast serious doubt on the validity of much administrative adjudication.<sup>236</sup> Disputes between private parties heard before agencies did not fit under the public rights doctrine, and it was exceedingly difficult to characterize the primary adjudicative body as simply an adjunct of some article III court which might be called on to perform a perfunctory review. Whatever precedential force *Northern Pipeline* retains, *Thomas* and *Schor* make clear that it need no longer be perceived as a threat to the adjudicative role of administrative agencies.

Both cases involved the administrative process. In *Schor* the agency performed the adjudication; in *Thomas* the arbitrator's adjudication was closely related to the agency's work. The Court first broadened the concept of public rights and then essentially abandoned it. Even private state law claims can be adjudicated since the source of the rights is only one relevant factor. Three aspects of agency adjudication ensure that it will withstand article III scrutiny, even the supposedly heightened level called for when non-federal private claims are involved.<sup>237</sup> The most important aspect of agency adjudication is that dispute resolution is only one part of a larger program which Congress enacted pursuant to one of its article I powers and over which the agency exercises substantial responsibility. "The concerns that drove Congress to depart from [a]rticle III" are now part of the Court's analysis, and in almost every case it can be expected to show "due regard" for "the unique aspect of the congressional plan at issue . . . ."<sup>238</sup> A closely related point is that in carrying out these programmatic responsibilities the agency may utilize adjudication as a means of formulating policy as well as resolving specific disputes.<sup>239</sup> The final important aspect of agency adjudication is that the Court may view it as superior to an article III trial. The agency has expertise, and its processes may be presented as more expeditious. They also possess sufficient judicial qualities to insure fundamental fairness.

In addition, the Court seems more or less to have adopted the position that Justice White advocated in his *Northern Pipeline* dissent: appellate review essentially satisfies whatever degree of article III involvement is required.<sup>240</sup> This is the "agency model" on which Justice O'Connor relied in *Schor*.<sup>241</sup> The question then arises as to how much appellate review is enough. In his extensive analysis and critique of *Northern Pipeline*, Professor Redish argues for a heightened standard of judicial review as a better way of attaining the absolutist goals which underlie Justice Brennan's opinion.<sup>242</sup> Redish argues for "nondeferential review of agencies'

---

236. See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587-88 (1985).

237. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3249, 3259 (1986).

238. *Id.* at 3261.

239. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

240. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 115 (1982) (White, J., dissenting).

241. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3249, 3258-59 (1986).

242. Redish, *supra* note 4, at 226-28.

interpretation of their statutory mandate as well as their application of statutory requirements to individual facts, and . . . reviewing with greater care than previously used an agency's primary factual findings."<sup>243</sup>

This is certainly an attractive fallback position, although it downplays the role of article III courts as initial adjudicators. (It also undercuts the efficacy of the administrative process, a price Professor Redish is apparently willing to pay.) However, neither Justice Brennan nor the post-*Northern Pipeline* majority has adopted this position. In *Thomas*, the extremely limited review of the arbitrator's decision was acceptable to both Justice Brennan and rest of the Court.<sup>244</sup> In *Schor*, Justice O'Connor treated the existing standards of review as adequate, even while indicating just how deferential they can be.<sup>245</sup> Justice Brennan's dissent dealt only with the initial adjudication.<sup>246</sup> Thus, one is tempted to conclude that where administrative adjudication is concerned Congress has a totally free hand,<sup>247</sup> as long as the initial disposition satisfies notions of due process and some appellate review is available, particularly for constitutional questions.<sup>248</sup>

In *Schor*, however, Justice O'Connor suggested two possible limits. Although agency disposition of the state law counterclaim was permissible in that case, "wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties."<sup>249</sup> On a more general level, constitutional problems would arise if "Congress created a phalanx of non-[a]rticle III tribunals equipped to handle the entire business of the article III courts without any [a]rticle III supervision or control and without evidence of valid and specific legislative necessities . . . ,"<sup>250</sup> even if parties had the option not to choose these forums.

In the first instance the rationale of *Schor* would probably work to sustain whatever Congress did. After all, Congress would enact such provisions on an agency by agency, or even a program by program, basis. In each case there would be weighty justifications for the step tied to the exigencies of dispute resolution in the underlying program. This is precisely Justice Brennan's point about the danger of incremental erosion: case-by-case analysis may be unable to stop it. The "agency model" would still be present, and the Court would uphold it. The "phalanx" hypothetical is somewhat more problematical. If the agencies' role were to become "the entire business of the article III courts" that would seem to be a substitution of the administrative process for the judicial process without any link to a substantive

---

243. *Id.* at 227-28.

244. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985) (opinion of O'Connor, J.), *id.* at 601-02 (Brennan, J., concurring).

245. *See* *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3249, 3255 (1986) (Agency expertise is superior to that of the court in determining whether regulation furthers the purpose of the statute; thus "substantial deference" is warranted.).

246. *E.g.*, *id.* at 3263.

247. *See, e.g.*, Bruff, *supra* note 199, at 502 (*Schor* "explicitly approved the existence of independent agencies, at least for adjudication.").

248. *See, e.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592-93, 601-02 (1985).

249. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3249, 3258 (1986).

250. *Id.* at 3260.

regulatory program enacted pursuant to article I. (Congress does, of course, possess an independent article I power over the creation and structure of the federal courts.)<sup>251</sup> That would remove one of the principal underlying justifications of the post-*Northern Pipeline* cases. Yet even here, Justice O'Connor goes so far as to suggest that legislative necessity is an important variable which might save such a scheme. Of course, Congress is unlikely to take any such step on a broad scale basis. For now, it is enough to note that, in the area of administrative adjudication, *Northern Pipeline's* bite is gone whatever the status of its bark.

#### B. Congressional Power over Federal Court Jurisdiction

Professor Resnik has suggested that when Justice Brennan wrote his strong defense of the role of article III courts within the constitutional scheme he had one eye on the "jurisdictional" bills which created a furor in Congress during the late 1970's and early 1980's.<sup>252</sup> These bills were generally not attempts to close all judicial forums to some claimants. Their principal goal was to limit or eliminate the role of the federal courts in specific subject areas such as school prayer.<sup>253</sup> A principal technique used was barring the lower federal courts from hearing such cases, thus remitting challenges of state actions to state courts, or removing the subject matter from the Supreme Court's appellate jurisdiction, or both.<sup>254</sup> The proponents relied primarily on Congress' power over the jurisdiction of the federal courts. Thus there was considerable debate over whether article III contains any "internal" limits<sup>255</sup> on this power, that is, limits apart from those which would be imposed independently by other provisions of the Constitution. Since *Northern Pipeline* and its progeny may shed some light on this area with so little direct precedent, their implications for the jurisdictional debate will be discussed briefly here.

As for the lower courts, it is hard to find internal limits on congressional power in either the language or structure of article III. This is the overwhelming view of academics,<sup>256</sup> and rests squarely on the Madisonian compromise.<sup>257</sup> Thus, nothing in article III appears to prevent Congress from "transferring" existing portions of lower federal court jurisdiction to the state courts.<sup>258</sup> Interestingly, the Madisonian

---

251. U.S. CONST. art. I, § 8, cl. 9.

252. Resnik, *supra* note 25, at 599. Proposals to curb federal court jurisdiction in controversial areas have been a recurrent phenomenon throughout the nation's history. See Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896-97 (1984) [hereinafter Gunther].

253. For descriptions of the bills, see, e.g., Gunther, *supra* note 252, at 895-96; Resnik, *supra* note 25, at 599 n.89; Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 18 n.3 (1981).

254. For example, S. 481, 97th Cong., 1st Sess. (1981) would have deprived both the lower federal courts and the Supreme Court of jurisdiction over cases arising out of state and local laws concerning voluntary prayers in public schools and buildings.

255. See, e.g., Gunther, *supra* note 252, at 900.

256. See, e.g., *id.* at 912-13.

257. Madison, along with James Wilson, proposed to let Congress decide whether or not to create lower federal courts. This "great compromise" between those who wanted a federal judiciary and those who feared one was pivotal in securing the Convention's approval of the Constitution. See, e.g., Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-55 (1975).

258. The question remains whether the state courts are under an obligation to exercise the jurisdiction so transferred. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947).

compromise surfaced in *Northern Pipeline* itself, and the notion of broad congressional power was accepted by both the plurality and the dissenters. In support of the proposition that appellate review by an article III court is the principal vehicle for satisfying separation of powers concerns, Justice White noted that Congress "clearly possesses" the power to assign all bankruptcy matters to the state courts.<sup>259</sup> Justice Brennan responded that Congress' power to assign matters to the state courts was inapplicable since those courts are not potentially subject to federal political control, as non-article III federal bodies might be.<sup>260</sup> He posits a clear dichotomy: "The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice[,] . . . [b]ut the Framers did not leave it to Congress to define the character of those courts . . . ." <sup>261</sup> Since *Thomas* and *Schor* give Congress even greater leeway in utilizing non-article III federal adjudication, the lack of internal article III constraints on assignment of initial matters is, if anything, reinforced.

Congress' ability to limit Supreme Court appellate jurisdiction has been more controverted.<sup>262</sup> The relevant language points to a plenary power—"with such exceptions, and under such Regulations as the Congress shall make"<sup>263</sup>—but the imperatives of the constitutional structure militate against denying the Supreme Court its dual role of ensuring the uniformity and supremacy of federal law, especially the Constitution.<sup>264</sup> This consideration has led several commentators to argue for an internal article III constraint over the exceptions and regulations clause. Congress may not use this power to "destroy the essential role of the Supreme Court in the constitutional plan," as Professor Hart put it.<sup>265</sup> This approach, frequently associated with the writings of Professor Ratner,<sup>266</sup> is generally referred to as the essential functions test. Such an approach has considerable appeal, although its critics<sup>267</sup> point to serious problems including the question of what power it leaves to Congress<sup>268</sup> and a major Supreme Court precedent which cuts in the direction of plenary power.<sup>269</sup>

Although extrapolation is necessary, it is possible to find support for the essential functions test in *Northern Pipeline* and its progeny. As a starting point, any underlying notion of a second class status for all federal courts is weakened by the Constitution's explicit requirement that there "shall" be<sup>270</sup> a Supreme Court. This

---

259. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 116 (1982) (dissenting opinion).

260. *Id.* at 64 n.15.

261. *Id.*

262. See Gunther, *supra* note 252, at 901.

263. U.S. CONST. art. III, § 2, cl. 2.

264. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960) [hereinafter Ratner].

265. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

266. *E.g.*, Ratner, *supra* note 264.

267. *E.g.*, Gunther, *supra* note 252, at 908-09.

268. *Id.* at 908.

269. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

270. "The judicial power of the United States, shall be vested in one supreme court . . . ." U.S. CONST. art. III, § 1.



part of the judiciary can assert co-equal status with more justification than the lower courts. The Court's main role is that of an appellate tribunal. (Although it also has a limited original jurisdiction.) Much of the focus in the *Northern Pipeline* trilogy is on the role of appellate review, with the pragmatic majority coming close to saying that appellate review is enough to satisfy article III. By implication then, lack of appellate review would not satisfy article III, and the pragmatic position becomes one of a requirement of some such review, at least for important questions such as constitutional ones.<sup>271</sup> This is also consistent with Justice Brennan's position; he argued in *Northern Pipeline* that appellate review may be required even in public rights cases.<sup>272</sup> In *Thomas* he went further and stressed the general importance of courts' ability to pass on questions of law as the key to their checking function.<sup>273</sup> Any requirement of appellate review strengthens the essential functions approach to Supreme Court jurisdiction since only this court can provide both supremacy and uniformity.

Indeed, much of the emphasis in the *Northern Pipeline* trilogy is on the need to preserve the judiciary's essential role, and that specific term is sometimes used.<sup>274</sup> Even under Justice White's balancing approach, it seems that Congress would have difficulty in justifying the inroads on article III values that eliminating the Supreme Court's role in constitutional issues would represent. (This difficulty would be even greater if no other article III court could pass on the question.) Even if Congress could somehow prevail in a balancing equation, there are significant suggestions in the post-*Northern Pipeline* opinions that absolute limits may exist. For example, the Court will consider whether a particular statute "threatens the independent role of the judiciary in our constitutional scheme."<sup>275</sup> Tampering with the Supreme Court's essential role as the national appellate tribunal seems to constitute such a threat, apart from any possible argument that Congress would be seeking to aggrandize its own power in constitutional issues by tilting the outcome of cases in a particular direction. Thus the *Northern Pipeline* doctrine, which began as an emphasis on initial adjudication in article III courts, may well bear on arguments over internal article III constraints with respect to appellate review. The notion of limits as adumbrated in the *Northern Pipeline* trilogy does support the essential functions test.

### C. Changing the Form of Adjudication Within the Article III Judicial System

*Northern Pipeline*, or what is left of it, poses seemingly slight obstacles to removing matters from the article III judicial system, at least as long as federal appellate review is available. *Schor* emphasizes the validity of the agency model. The validity of state court adjudication is, of course, a fundamental component of the Madisonian compromise. Might, however, the *Northern Pipeline* doctrine still

---

271. See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592-93 (1985).

272. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 69 n.23 (1982).

273. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 601 n.4 (1985) (concurring opinion) (power to interpret statutes checks executive power and that of administrative agencies).

274. E.g., *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3249, 3258 (1986).

275. E.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590 (1985).

impose constraints if Congress, or the district courts through local rules, attempt to alter the form of adjudication within article III courts? This is a question of considerable practical importance, given the general interest in forms of alternative dispute resolution and the increasing use of magistrates<sup>276</sup> and techniques such as court-annexed arbitration.<sup>277</sup> These techniques are aimed at reducing the mounting backlog within the federal courts, whose caseload is perceived as a serious impediment to doing justice.<sup>278</sup> In any such devices there are obviously direct echoes of the system of bankruptcy judges that was at issue in *Northern Pipeline* itself.

At first one must consider whether this is really a different problem from the removal of matters from article III courts. Any substantial change in the mode of adjudication can certainly reach the point of taking cases "out" of article III resolution as it is generally known and placing them in the hands of the alternate mechanism. Thus the post-*Northern Pipeline* balancing test might be applied here just as in other contexts. *Northern Pipeline* itself shows how the lines can be blurred; did that case involve removal from article III or an alteration in existing forms of adjudication? After all, Congress was careful to label the new decisionmakers "bankruptcy judges," and treated the system as existing within the federal district courts.<sup>279</sup> For Justice Brennan, of course, this was a "facade."<sup>280</sup> Nevertheless, the lines are not easy to draw.

Despite this uncertainty it may be helpful to view the alteration of article III adjudication as a separate and somewhat different problem from removal of matters from article III courts. Devices such as magistrates are placed within the judicial system and are ostensibly a part thereof.<sup>281</sup> Thus, public perceptions and expectations as to how the federal judiciary operates are relevant in evaluating subtle and somewhat invisible changes in that mode of operation. The adjudication is not transferred to an entity which can claim a distinct and legitimate existence in its own right, as is the case with states and agencies. States are a separate, integral component of the constitutional system, and agencies are now generally recognized as a fourth branch of government carrying out identifiable substantive programmatic responsibilities of their own. To the extent that alterations of current court decisionmaking are viewed as occurring within the judiciary, the formalistic approach which the Supreme Court utilized in *Chadha* may come into play. Just as that case held that there is only

---

276. See, e.g., Note, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032 (1985) [hereinafter Note, *Boundaries*].

277. See Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 32 (1985).

278. See, e.g., *Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc), cert. denied, 469 U.S. 823 (1985).

279. See *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 53 (1982).

280. *Id.* at 86.

281. See, e.g., Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 456-57 (1983) (difference between administrative adjudication and "allowing nontenured judges to exercise the jurisdiction vested by statute in article III courts themselves.") (footnote omitted); cf. Krattenmaker, *supra* note 105, at 310 (Congress could not create specialized courts and grant to their nontenured judges "the inherently judicial power to interpret and apply federal statutes."). Such an analysis assumes an ability to distinguish between administrative adjudication (agencies do "interpret and apply" statutes after all) and adjudication by nontenured judges within the article III judicial system. See *id.* at 311.

one way to legislate,<sup>282</sup> a similarly inclined Court might hold that there is only one way to adjudicate. As Justice Brennan put it in *Northern Pipeline*, "the Framers did not leave it to Congress to define the *character* of [federal] courts . . . ."<sup>283</sup> The *Northern Pipeline* doctrine deals ultimately with the danger of erosion of the current role of the federal judiciary. That danger may be present here in potentially far reaching forms.

One can illustrate the general problem by reference to the growing use of magistrates at the district court level. This practice is authorized by the Federal Magistrates Act of 1979,<sup>284</sup> and is supplemented by the Federal Rules of Civil Procedure<sup>285</sup> and local rules of the federal district courts.<sup>286</sup> Magistrates perform a wide range of functions, including hearing various pre-trial motions and adjudicating entire cases if the parties so consent. The former function has been upheld on the ground that the district judge reviews the magistrate's work and makes the ultimate decision.<sup>287</sup> It is the latter aspect of magistrate practice which may present constitutional problems under *Northern Pipeline*. Indeed, after that case was handed down, the consensual reference of cases became the subject of considerable dispute within the lower courts. The courts of appeal have been unanimous in upholding the validity of magistrate decision of entire cases despite arguments based on *Northern Pipeline*.<sup>288</sup> Nevertheless, there have been dissents,<sup>289</sup> warnings from court majorities that the situation could change,<sup>290</sup> and opposing points of view among commentators.<sup>291</sup>

The post-*Northern Pipeline* cases relied on the approach to adjuncts which Justice Brennan utilized in his plurality opinion.<sup>292</sup> (Since magistrates can handle the entire gamut of civil cases, the public rights approach, at least as outlined in *Northern Pipeline*, simply would not stretch far enough to validate their jurisdiction.) The magistrate disposition of cases looks a good deal like the system of bankruptcy judges struck down in *Northern Pipeline* itself. In particular it is the magistrate who performs the basic adjudication and renders the equivalent of a final district court judgment in a normal civil case. However, the courts of appeals have relied on the general notion that the district courts exercise enough control over the magistrate to make him or her a genuine adjunct as opposed to the spurious adjuncts which Justice Brennan found present in *Northern Pipeline*.<sup>293</sup> In part this control is exercised

282. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 954-55 (1983).

283. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 64 n.15 (1982) (emphasis added).

284. 28 U.S.C. § 631 (1982).

285. Fed. R. Civ. P. 72-76.

286. The Act contemplates such rules. See, e.g., 28 U.S.C. § 636(c)(2), (4).

287. *United States v. Raddatz*, 447 U.S. 667, 681-82 (1980).

288. See, e.g., Note, *Boundaries*, *supra* note 276, at 1034 n.16 (collecting cases).

289. E.g., *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc), (Schroeder, J., dissenting), *cert. denied*, 469 U.S. 823 (1985).

290. E.g., *id.* at 546 (declining to invalidate consensual reference practice "at this stage in the evolution of the magistrate system").

291. Compare Harvard Magistrate Note, *supra* note 101 (upholding practice) with Note, *Boundaries*, *supra* note 276 (arguing for unconstitutionality).

292. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 76-87 (1982).

293. See, e.g., *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 823 (1985).

through appellate review,<sup>294</sup> although that would seem clearly insufficient under *Northern Pipeline*. In addition, the courts of appeals have relied on other controls which the district courts exercise over the magistrates, including naming them to the position<sup>295</sup> and retaining the power to remove specific cases from a magistrate if special circumstances so warrant.<sup>296</sup> (Of course, the negative aspect of this general control might well be a lack of independence in the magistrates, given the degree of power which the district courts hold over them.)<sup>297</sup>

The courts of appeals have also emphasized the role which consent plays in the referral of an entire case to a magistrate.<sup>298</sup> It is not clear how significant a role the lack of consent played in *Northern Pipeline* itself.<sup>299</sup> But even in *Schor* Justice O'Connor said that consent could not allow an impairment of structural values, matters which it is not within the province of individual litigants to waive.<sup>300</sup> It has been argued that consent is simply irrelevant to a constitutional assessment of the use of magistrates.<sup>301</sup> On the other hand, the presence of consent provides a possible analogy to settlement and alternative devices under which the parties opt out of coming to court for a decision.

Even with consent, however, it is hard to see how under a strict application of *Northern Pipeline* the magistrates' civil jurisdiction passes muster. What the magistrate does looks like a full-blown adjudication rather than any alternative thereto. Yet this adjudication is performed within the federal judicial system by persons who are not article III judges. The district courts' supposed general controls do not relate to specific cases. Case specific controls, notably the ability to remove cases from a magistrate, are unlikely to be used, and the standards for their use are unclear.<sup>302</sup> Nonetheless, the courts of appeals have erected a substantial wall of authority in favor of magistrate adjudication.<sup>303</sup>

If magistrate decision of entire cases could survive a concerted attack based on *Northern Pipeline*, it is tempting to conclude that such an attack is a fortiori doomed to failure given the attitude and analysis of the successor cases. The precise status of "adjunct" analysis is not clear. Justice O'Connor did not use it in *Schor*. She may

---

294. *E.g.*, *id.* at 545-46. *See generally*, 28 U.S.C. § 636(c)(3), (4) (1982) (providing right of appeal).

295. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 823 (1985).

296. *Id.* Some commentators have read the act to require initial reference by the district court on a case-by-case basis. *E.g.*, Harvard Magistrate Note, *supra* note 101, at 1959 n.62. This seems to be an incorrect reading. The Act appears to contemplate a general designation of specific magistrates by each court "to exercise civil jurisdiction" under the consensual provision. *See also* FED. R. CIV. P. 73(a), (b). *But see* Note, *Boundaries*, *supra* note 276, at 1060 n.155.

297. *See* Note, *Boundaries*, *supra* note 276 at 1062-63.

298. *E.g.*, *Wharton-Thomas v. United States*, 721 F.2d 922, 925-26 (3d Cir. 1983).

299. All of the Justices noted the absence of consent to having the bankruptcy court hear the state law claim, but this does not seem to be a major factor in the various analyses. *See Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 80 n.31 (1982) (opinion of Brennan, J.); 91 (Rehnquist, J., concurring); 92 (Burger, C.J., dissenting); 95 (White, J., dissenting). *But see* *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3249, 3256 (1986) (absence of consent a "significant factor" in *Northern Pipeline*).

300. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3249, 3257-58 (1986).

301. Harvard Magistrate Note, *supra* note 101, at 1952-54.

302. *See Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 552 (9th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 823 (1985), (Schroeder, J., dissenting) (lack of statutory guidance over exercise of controls).

303. *See* Note, *Boundaries*, *supra* note 276 at 1034.

not have wished to refer to agencies as adjuncts, or she may have wished to collapse Justice Brennan's inquiry—exceptional congressional authority/public rights or adjunct status—into a single approach guided essentially by three factors: the extent to which essential judicial power is maintained, origin and importance of the rights at issue, and the concerns that impelled Congress. In any event, let us assume that alterations of adjudication within the existing system will be analyzed in the same way as removal of cases from the system, rather than being analyzed in a highly formalistic *Chadha*-like approach. How does magistrate decision of civil cases fare under the three factor approach?

As for the essential attributes of judicial power, a right of appeal from magistrate decisions does exist. As argued above, the presence of an appeal to an article III court appears in *Schor* and *Thomas* to satisfy any essential judicial role. Moreover, the appellate court may exercise less deference to the magistrate's decision, particularly in the area of law, than would be the case with an agency, given the practice of deference to agency expertise.<sup>304</sup> Of course, whatever value can be attached to the various additional controls which district courts exercise over magistrates makes them a plus in the equation, since there are no such controls over agencies. The origin and importance of the rights at issue may no longer be an important factor, given the relative demise of the public rights doctrine. In *Schor*, the agency could hear even state law claims. Therefore the sweeping range of the magistrates' jurisdiction may not be a strong argument for its invalidity. As for the congressional concerns underlying the magistrate system, the obvious ones relate to the backlog in the federal courts, and improving the efficacy of those tribunals. Similar concerns were cited by the Court in both *Schor* and *Thomas* as the sort to which a reviewing court should give weight.<sup>305</sup> Indeed, *Crowell v. Benson* itself cited such considerations as valid reasons for Congress to act in the area of dispute resolution.<sup>306</sup>

Upon closer scrutiny, however, it can certainly be argued that application of the three, admittedly malleable, factors utilized in *Schor* raises doubts about the constitutionality of magistrate adjudication of entire cases. Consider the issue of congressional concern. Congress' desire to reduce court backlog is not tied to any substantive article I program of which adjudication is a necessary part. This is an important distinction from the "agency model" referred to in *Schor*. Agencies are responsible for implementing a congressional program and utilize adjudication to formulate policy as well as to resolve disputes under that program. Congress does possess a general power over the organization and operation of the lower federal tribunals,<sup>307</sup> and that may be broad indeed, ranging from housekeeping and mechanical details to jurisdictional amounts and to the very existence of these courts. Nonetheless it is not clear that this is a general power over dispute resolution which goes so far as to permit

---

304. *But see* Resnik, *supra* note 25, at 608.

305. *E.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590 (1985) (citing "near disaster" of prior system).

306. *Crowell v. Benson*, 285 U.S. 22, 54 (1932).

307. U.S. CONST. art. I, § 8, cl. 9. *See, e.g.*, *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (Constitutional provision for federal court system, augmented by necessary and proper clause, includes power to make rules governing practice and procedure.).

alteration of the fundamental nature of one of the three branches of the national government. This may be one of those instances in which the greater power does not include a seemingly lesser one. It seems difficult to describe Congress' power over the lower federal courts as somehow "exceptional," a mode of analysis which played a considerable role in *Northern Pipeline* and which may still be relevant in a balancing process. As noted, there is no independent programmatic justification outside of the operation of the courts themselves, unless one is prepared to make the somewhat tenuous argument that the overall operation of congressional programs is impeded since recourse to the federal courts, which is frequently tied to their enforcement, has now become so difficult as to impair the utility of those underlying programs.

As to the type of right adjudicated, *Schor* is not necessarily a precedent for the proposition that anything goes. There the state law based claim of the broker for commissions due was closely related to the customer's federal law claim of illegal acts in connection with commodity futures trading. In order to facilitate adjudication of that right in Congress' chosen forum there was much to be said for allowing a limited counterclaim jurisdiction. The magistrates' consensual jurisdiction, on the other hand, runs the entire gamut of civil cases which might come before the district courts. In no way can it be justified as a "specialized" area, as was the case, to some extent, with the bankruptcy judges in *Northern Pipeline*.<sup>308</sup> The expertise of the magistrates would seem to be identical with that of the federal district judges themselves, yet the former do not enjoy the guarantees of article III.

Much then may turn on the first factor: preserving the essential attributes of judicial power. Again, the central question is whether a meaningful role in the initial adjudication of some matters is one of these attributes. The justifications for emphasizing initial adjudication discussed above in defense of Justice Brennan's plurality opinion are relevant here.<sup>309</sup> It may well be important to retain the role of the federal judiciary, especially the judge (acting with a jury when required or appropriate), as the primary dispute resolver within the federal government. This is what the judicial branch does. Widespread use of magistrates to decide entire cases alters the way in which the institution functions and blurs accountability for its operations. Magistrates look like judges both because of what they do and where they are. Perhaps in dealing with magistrates the first factor should be restated as the need to preserve the essential attributes of judicial power *within the federal courts when those courts are used as the adjudicative mechanism*.

There may also be questions as to the quality of decisions rendered by magistrates.<sup>310</sup> These individuals are not likely to be of the same caliber as presidential appointees to the federal bench, and their decisions may reflect this difference. Nevertheless, their decisions will be viewed to some extent as coming from the federal courts themselves, and may even acquire a degree of precedential value.<sup>311</sup> Of course,

---

308. See *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 117-18 (1982) (White, J., dissenting) (discussing bankruptcy courts as specialized tribunals).

309. See *supra* text accompanying notes 108-117.

310. See, e.g., Note, *Boundaries*, *supra* note 276, at 1064.

311. *Id.* at 1059.

arguments for keeping the federal judiciary attractive to high caliber candidates may argue for greater use of magistrates. If magistrates, and similar alternative adjudicators, serve to rid the judges of small or insignificant cases use of these techniques may satisfy concerns voiced by those such as Justice Scalia on the drudgery increasingly associated with the federal judicial function.<sup>312</sup> Still, to paraphrase *Chadha*, the convenience of judges cannot by itself be sufficient justification for altering the basic structure of governmental institutions within the tripartite system.

This last point underscores the fact that devices like the use of magistrates are not likely to come from Congress out of hostility to the courts. Judges may even be the moving force in instituting the use of such devices. For example, it is conceivable that some forms of alternative dispute resolution which reduce the role of the judge will find their origin in local rules of court passed under broad congressional delegations<sup>313</sup> rather than being authorized by a specific statute such as the Magistrates Act. Although Justice Blackmun once seemed to suggest that it was alright for the judges to erode their own power,<sup>314</sup> the spirit of article III may call for direct congressional involvement in any scheme that can alter the functions of one of the three basic institutions. In other words, dilution of the federal judicial power raises such serious separation of powers questions that Congress ought to consider them specifically. Perhaps delegation of the power to make local rules should be narrowly construed so as not to embrace such steps.<sup>315</sup>

The spirit of article III also calls for considerable hesitancy in allowing Congress to take such a step, regardless of how benign the motive. Justice O'Connor's "phalanx" hypothetical indicates that there are article III limits in this area.<sup>316</sup> Perhaps the prophylactic approach of *Northern Pipeline* is even more necessary in making changes within the federal judicial system than in removing classes of cases to a clearly different forum with its own forms of visibility and accountability.

This is potentially true for other dispute resolution devices, as well as for magistrates. (A principal problem is drawing a line between encouraging parties to go outside the judicial system to resolve disputes and making changes in the methods of adjudication within that system. It is the latter which raise essential attributes problems.)<sup>317</sup> The fact that widespread use of magistrates is relatively new can cut in either of two directions. On the one hand, since it is an experiment, perhaps the courts in reviewing it should take a hands-off attitude in order to see how things develop.<sup>318</sup>

312. See Taylor, *Scalia Proposes Major Overhaul of U.S. Courts*, N.Y. Times, Feb. 16, 1987, at 1, col. 1.

313. See 28 U.S.C. § 2071 (1982) (general rule-making power of federal courts).

314. *United States v. Raddatz*, 447 U.S. 667, 685 (1980) (concurring opinion).

315. This objection may have less force with respect to specific delegations such as those in the Magistrates Act.

316. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3249, 3260 (1986).

317. Federal Rule of Civil Procedure 16 recognizes such a line. Rule 16(c) lists "Subjects to be Discussed at Pretrial Conferences." These include "the advisability of referring matters to a magistrate or master" (16(c)(6)) and "the possibility of settlement or the use of *extrajudicial* procedures to resolve the dispute" (16(c)(7)) (emphasis added). The Advisory Committee's notes describe Rule 16(c)(7) as "exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse." Amendment of Federal Rules of Civil Procedure Adopted by the Supreme Court of the United States on April 28, 1983, Effective August 1, 1983, with Advisory Committee Notes Thereon, *reprinted in* FEDERAL RULES OF CIVIL PROCEDURE 355 (Foundation 1987).

318. See, *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 823 (1985).

On the other hand, there is no entrenched mechanism or set of established expectations which would be disturbed by subjecting any such new techniques to extremely strict scrutiny.<sup>319</sup> Courts of appeals have suggested that the system might somehow go too far.<sup>320</sup> If that perception is correct it may result in application of the *Northern Pipeline* doctrine even in its altered, watered-down form.

## V. CONCLUSION

The article III cases discussed above are replete with ironies. Justice Brennan, the Court's ultimate liberal, emerges as the staunch defender of the conservative doctrines of separation of powers<sup>321</sup> and strict construction. In *Northern Pipeline* he attempted to do for the federal courts what Justice Rehnquist attempted to do for the states in *National League of Cities*: erect absolute barriers to protect governmental entities against congressional erosion of their institutional status. In the article III context, however, the conservative majority downgrades these concerns in favor of governmental convenience and falls back on a possibly toothless balancing test as the measure of legislative validity. These Justices are in part concerned with preserving the administrative state, a goal not always associated with conservatives generally.<sup>322</sup> The strict approach to separation of powers issues found in the Burger Court's article I and article II cases simply vanishes.

This Article has examined the Court's movement from *Northern Pipeline* and its equally strict approach to the flexibility of *Thomas* and *Schor*. Several explanations of this development are possible. One explanation seems to be the current Court's willingness to relegate the article III judiciary to a lesser status than the political branches. Perhaps it is not surprising, then, to find Justice Brennan going in the opposite direction, albeit by an unexpected route.

The remaining questions concern what is left of *Northern Pipeline*. What has been referred to here as the *Northern Pipeline* doctrine—a requirement that “core” judicial matters be litigated at all stages in article III courts—has been first watered down and then, seemingly, abandoned. Nevertheless, *Northern Pipeline* has not been overruled. The *Northern Pipeline* trilogy is perhaps relevant to debates over the Supreme Court's essential role. Could *Northern Pipeline* itself rise again to strike down a congressional authorization of non-article III adjudication that went too far? The answer may well be no, given what was done and said in *Thomas* and *Schor*. Yet the *Northern Pipeline* doctrine, in some form, might still bear on efforts to alter the form of adjudication within article III courts. Perhaps it is here that the greatest danger of erosion of the judiciary lies: preventing that erosion is the essence of *Northern Pipeline*.

---

319. This was the case with the administrative adjudication mechanisms which *Northern Pipeline* possibly called into question.

320. See, e.g., *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984).

321. See McConnell, *The Counter-Revolution in Legal Thought*, 41 Policy Rev. 18, 20 (Summer, 1987) (expressing approval of the Court's recent emphasis on separation of powers).

322. See, e.g., Taylor, *Conservatives Assert Legal Presence*, N.Y. Times, Feb. 1, 1987, at 18, col. 1 (Judge Robert Bork criticized by conservatives for stating that the regulatory heritage of the New Deal is firmly established as a constitutional matter).